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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 149

JAMES C. TITUS, RENATA TITUS, RENATA M. RUSSELL, TUDOR A. WALL, KATHLEEN WALL AND H. W. KELLEY,

Petitioners,

vs.

THE SPITZER-RORICK TRUST & SAVINGS BANK, MARVIN H. RORICK, AND CELIAN H. RORICK, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HORTON C. RORICK, DECEASED; JAMES R. EASTON, JOSEPH R. GRUNDY, AND THE SPITZER-RORICK TRUST & SAVINGS BANK,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Supreme Court of the United States:

Petitioners, James C. Titus, Renata Titus, Renata M. Russell, Tudor A. Wall, Kathleen Wall and H. W. Kelley, respectfully petition this Honorable Court that a Writ of

thereafter appointed a master to take the accounting and resolve the question of damages.

Following protracted hearings before the Master and the coming in of his report, the District Court confirmed such report, denied Petitioners any further relief, and dismissed the cause. The Circuit Court of Appeals affirmed.

The substantive aspects of the matters involved are whether or not the courts below have held the Committee to that standard of conduct applicable to fiduciaries and trustees, have required such Committee to make a full and complete and honest accounting, have sanctioned an utter failure to account by denying Petitioners any relief on the basis of the obscure accounting that was made, and have sanctioned a breach of fiduciary duty in not awarding Petitioners any damages for the wrongful conversion and unwarranted detention of trust property by the Trustees.

The procedural aspects of the matters involved are of the utmost importance because of the absolute and complete failure of the Courts below to give effect to the Federal Rules of Civil Procedure concerning evidence and discovery by consistently denying to Petitioners their rights in this regard, by failure and refusal to enforce process to that end and by disregarding fundamental rules of evidence.

To avoid repetition, reference is respectfully prayed to Section III of the Supporting Brief being filed herewith, where will be found the salient facts and proper record references.

Statement Disclosing Basis of Jurisdiction

1. The jurisdiction of this Court to review this cause is based upon 28 U.S.C. 347, and upon Rule 38, Sub-section 5 (b) of the Supreme Court Rules, upon the following grounds:

(a) The Circuit Court of Appeals has decided Federal questions in a way probably in conflict with applicable decisions of this Court.

(b) The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for this Court's power of supervision.

2. The judgment and decision of the Circuit Court of Appeals is under date of April 12, 1948, and has been reported in 167 F. (2) (Adv. Sh.) 571; these are likewise found on pages 1566-1584 of the Record.

This petition for writ of certiorari is being filed within three months after the entry of such judgment.

The Questions Involved

The questions involved may be stated as follows:

I. Were Respondents held to the standard of conduct and their strict liability to account to which they were subject as Trustees of an express trust; and were Petitioners consistently denied their rights to a full disclosure by and discovery from Respondents, as provided generally by the rules of equity, and particularly by the Federal Rules of Civil Procedure?

II. When the following facts were conclusively made to appear:

(a) That Respondent Trustees had never rendered an account to any one and had no intention of accounting to any of the beneficiaries of the trust; and

(b) That four years after the accomplishment of the purposes of the trust, there remained in the hands of the Trustees, unaccounted for, assets and funds that

would never be accounted for and disbursed to the beneficiaries, unless ordered by the Court; and

(c) That no audit of any character had ever been made of the trust; and

(d) That no books or records whatsoever were kept of receipts, disbursements, or the application of the proceeds of collections in the form of a ledger, cash book, journal, judgment ledger, or otherwise, although the trust had handled approximately $5,000,000; and

(e) That there was not only constructive, but actual fraud upon the beneficiaries; and

(f) That there had been a complete bungling of the affairs of the trust resulting in nothing of value being accomplished for the beneficiaries,

was it not the duty of the Court, on its own motion, or otherwise, to award the following relief:

1. Deny any compensation to the Trustees;

2. Reduce the exorbitant fees allowed the Depositary, Secretary-Treasurer, and attorneys for the Trustees;

3. Appoint a successor trustee with orders to make a thorough audit and detailed accounting, and report the same to the Court;

4. Restore to all beneficiaries their rights in the trust as disclosed by the final audit and accounting.

III. Were not Petitioners entitled to damages to be measured by the legal rate of interest on the value of their securities from the time when Respondent Trustees unlawfully converted them by an unauthorized sale until the date when such securities were returned to Petitioners, as well as exemplary damages?

Reasons Relied Upon for Allowance of the Writ

1. That the Circuit Court of Appeals decided Federal questions in a way probably in conflict with applicable decisions of this Court in its holding:

(a) That the Respondents measured up to the standard of conduct prescribed for trustees and fiduciaries. *Woods* vs. *City National Bank & Trust Co. of Chicago,* 312 U.S. 262, 85 L. Ed. 820, 61 S. Ct. 493; *American United Mutual Life Insurance Co.* vs. *City of Avon Park,* 311 U.S. 138, 61 S. Ct. 157, 85 L. Ed. 91.

(b) That an accounting suit by the beneficiaries of an express trust against their trustees has all the characteristics of an adversary proceeding rather than being a matter of course whenever a trust relationship is made to appear, in which case the burden is on the trustees to make full, complete and honest disclosure. *Barney* vs. *Saunders,* 16 How. 535, 14 L. Ed. 1047; *Dillman* vs. *Hastings,* 144 U.S. 136, 12 S. Ct. 662, 36 L. Ed. 378; *Woods* vs. *City National Bank & Trust Co. of Chicago,* supra; *Weil* vs. *Neary,* 278 U.S. 160, 49 S. Ct. 144, 73 L. Ed. 243.

(c) That under the Federal Rules of Civil Procedure, as well as under fundamental rules of equity, rights of discovery may be wholly disregarded to the obvious prejudice of parties and enforced only if the convenience of the opposite party is not disturbed.

2. That the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned the departure by the District Court, as to call for an exercise of this Court's power of supervision in the following respects:

(a) In its holding that Respondent Trustees had sufficiently and adequately accounted for their administration of the trust.

(b) In its holding that the exorbitant compensation to the Trustees, Attorneys and Depositary should not be drastically reduced or compensation denied.

(c) In its holding that no error was made in consistently denying access to original records and documents, and accepting secondary and hearsay evidence.

(d) In affirming the District Court's consistent denial of Petitioners' rights to discovery and its refusal to admit competent and relevant original evidence tendered by Petitioners concerning the administration of the trust involved.

(e) In its holding that when it is proved beyond peradventure of doubt that Respondent Trustees have moneys unaccounted for in their possession as the result of the administration of the trust, beneficiaries have no right therein and such Trustees do not have to account therefor.

(f) In its holding that Petitioners are not entitled to damages for the wrongful conversion and unwarranted detention of trust property by Trustees.

The erroneous holdings above indicated will be treated as embracing the questions specifically presented by this petition under the particular assignments of error contained in the supporting brief.

WHEREFORE, your Petitioners respectfully pray that upon the granting of such writ of certiorari, the judgment of the said Circuit Court of Appeals for the Sixth Circuit may be reversed, and your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

ROBERT J. PLEUS,
First National Bank Building,
Orlando, Florida,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 149

JAMES C. TITUS, RENATA TITUS, RENATA M. RUSSELL, TUDOR A. WALL, KATHLEEN WALL AND H. W. KELLY,

Petitioners,

VS.

THE SPITZER-RORICK TRUST & SAVINGS BANK, MARVIN H. RORICK, AND CELIAN H. RORICK, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF HORTON C. RORICK, DECEASED; JAMES R. EASTON, JOSEPH R. GRUNDY, AND THE SPITZER-RORICK TRUST & SAVINGS BANK,

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Reference of Opinion of Court Below

The opinion of the Circuit Court of Appeals of the Sixth Circuit has been reported in 167 F. (2) (Adv. Sh.) 571, and is found on pages 1566-1584 of the Record.

N. B. The record in this cause is extremely voluminous, consisting of approximately 3200 pages of pleadings and testimony, and 197 exhibits. It consists of seven bound volumes. The Court is asked to note that the volumes are divided as follows:

Vol. I—Consisting of pages 1 to 288, contains the pleadings and orders of the Court below;

Vols. II, III, IV and V--Consisting of pages 1 to 1346, contain the testimony;

Vol. VI—Being paged from 289 to 862, consists of Defendants' Exhibits, being 104 in number;

Vol. VII—Being paged from 865 to 1565, contain Plaintiffs' Exhibits, being 93 in number.

Thus, in this brief we shall, throughout, give the record reference to indicate volume and page in the following manner: VI-291 will indicate that the reference is found in Volume VI on page 291 thereof. We call the Court's attention to the fact that each of the volumes contains a complete index of all seven volumes.

Throughout this brief, unless otherwise indicated, emphasis is supplied.

Petitioners were Plaintiffs in the District Court and Appellants in the Circuit Court of Appeals, and will be referred to in this brief as either Petitioners or Plaintiffs; and the Respondents will be referred to as either Respondents or Defendants.

II

Grounds of Jurisdiction

The jurisdiction of this Court to review this cause is based upon 28 U.S.C. 347 and upon Rule 38, Sub-section 5 (b) of the Supreme Court Rules, upon the following grounds:

(a) The Circuit Court of Appeals has decided Federal questions in a way probably in conflict with applicable decisions of this Court.

(b) The Circuit Court of Appeals has so departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the District Court as to call for this Court's power of supervision.

III

Statement of the Case

1. *Nature of Action, Pleadings, Rulings and Judgments of the Courts Below.*

On November 1, 1943, Plaintiffs filed against the Defendants a complaint consisting of seven causes of action (I-2). The first six causes of action sought, on behalf of the six Plaintiffs severally, the same relief, to-wit, a return of certain specified securities which had been deposited with the Defendants, who had constituted what was known as the Florida Everglades Bondholders' Protective Committee, together with damages sustained by the unlawful and malicious detention of said securities from the 30th day of June, 1941. The seventh cause of action was on behalf of all Plaintiffs and alleged the Defendants to be trustees of an express trust and that they had received and collected large sums of money by way of collections on securities and by way of assessments against depositors of bonds; that certain moneys had been expended and liabilities incurred and compensation paid to themselves and their employees; that Plaintiffs had been required to pay an assessment against them of $35 per $1,000 bond; that a demand had been made of the Defendants to account for their receipts and liabilities, but that Defendants had, at all times failed so to do; and alleged that Plaintiffs have no knowledge of the affairs of the Committee and no means of obtaining such information, unless Defendants be required by order of Court to disclose the same. Plaintiffs further alleged that the assessments against them were based or calculated

upon fees for personal services so excessive or exorbitant as to be fraudulent and prayed that the Defendants be ordered to render an itemized accounting, together with statement of all fees for personal services and all liabilities incurred, and that if it be determined that the assessments are excessive or unlawful that the Court fix and determine the amount that should be refunded to Plaintiffs and that Plaintiffs have such other and further relief as they may be entitled to.

Answer and so-called cross-claim by Defendants was filed (I-39) in which Defendants admit that Plaintiffs were owners and depositors under the Deposit Agreement, and admitted the demand, and alleged their willingness to deliver the same to Plaintiffs "when and if said Plaintiff will accept the same as a full release and discharge of the Defendants" (I-41). The answers to the remaining six causes of action were virtually the same. The Defendants attempted to set up that they have construed the Deposit Agreement to require such release. In answer to the seventh cause of action seeking the accounting, Defendants admit the receipt of moneys and allege that they have retained the sums necessary to pay fees, expenses and compensation, and attempt to justify the $35 assessment on the ground that it was fixed by the Committee in its uncontrolled discretion, as provided for in the Deposit Agreement (I-70). The answer denies that Plaintiffs are entitled to any accounting, and that the time for the accounting provided for in the agreement has not arrived because the Deposit Agreement has not had its purposes fully accomplished (I-71). Defendants also allege that their accounting would be voluminous, burdensome and expensive. The cross-claim again alleges the requirements as to a "full release and discharge of defendants" (I-74), and prays the Court for advice and direction as to whether Plaintiffs are entitled to withdraw and the terms and conditions under which the same may be

made. The prayer in the answer is likewise that the Court determine the true worth and value of Defendants' services to Plaintiffs and that Defendants be awarded the costs of this proceeding, including their attorneys' fees and additional compensation for the services of the Committee made necessary by this proceeding, the same to be declared to be a lien upon the Plaintiffs' bonds on deposit (I-75).

Attached to the answer is a copy of the original Committee Agreement (I-76), and amendments thereto of January 6, 1933 (I-98), of July 6, 1936 (I-103), of April 19, 1941 (I-104), and of June 6, 1941 (I-105).

Plaintiffs filed motion for judgment on the pleadings February 26, 1944 (I-107), and a reply to the counter-claim (I-109).

The Court below, in its memorandum filed April 24, 1944 (I-112), awarded Plaintiffs a judgment requiring Defendants to deliver to the Plaintiffs the bonds in question, together with an assignment of their pro-rata share of the judgment held by the Committee and to *accompany* the delivery with an itemized accounting of receipts, expenditures and disbursements, including fees for personal services received by each and a statement of all liabilities as prayed for in the seventh cause of action (I-116). Pursuant to said memorandum, the Court entered its order conforming thereto on April 28, 1944 (I-117). Attempt by motion was made by Defendants to vacate the judgment entered on May 6, 1944 (I-118), which was overruled May 13, 1944 (I-120).

Defendants then sought to file a supplemental answer and counterclaim, and at a pre-trial conference it was determined that the issues remaining for decision "include an accounting and determination of damages," and that it was advisable to submit the matter to a Master. This was done by order filed October 30, 1944 (I-124). It should be specifically noted that this was done after Defendants had filed on

July 1, 1944 their list of disbursements and estimated liability as required by said order of April 28, 1944. This list appears as Defendants' Exhibit 24 (VI-595 et seq.).

Subpoenae duces tecum were obtained by the Plaintiffs in advance of the hearing before the Master (I-129-132).

In the course of the hearing, and on June 8, 1945, Plaintiffs filed an application for interpretation of prior orders and instructions to the Master (I-134), attaching thereto relevant portions of the record. This application was not ruled upon by the Court until its denial on March 15, 1946 (I-152), following the completion November 13, 1945, of all testimony before the Master.

In the course of the hearing, and because prior *subpoenae duces tecum* had not been complied with and motions to produce had been denied, Plaintiffs again had issued such subpoenae directed to the various Defendants (I-143-148).

On February 6, 1946, a motion was filed reciting that certain of the correspondence produced had disclosed additional relevant correspondence, and the Court was moved for an order requiring the Defendants to produce the same for inspection and use in evidence (I-149). This motion was denied by the Master in his report.

The report of the Master, consisting of 95 printed pages, was filed August 7, 1946 (I-153-248). In this report all relief to the Plaintiffs was denied, and it was recommended that the bill be dismissed and the counter-claim be dismissed.

Promptly, and on August 19, 1946, objections to the report were filed by Plaintiffs (I-249), and motion made to sustain the same October 8, 1946, and by order entered October 23, 1946, the Court adopted the Master's report, overruled the objections of the Plaintiffs, approved and confirmed the Master's report as the findings of fact and conclusions of law of the Court, dismissed the complaint at the cost of the Plaintiffs, and the counter-claim at the cost

of the Defendants (I-277). Between the Master's report and the hearing before the Court, the defendant, Horton C. Rorick died on August 18, 1946, and his executors were substituted in his stead (I-276).

Plaintiffs promptly filed motion for new trial October 30, 1946 (I-278), and on November 8, 1946, order denying said motion for new trial was entered (I-279). Appeal was perfected to the Circuit Court of Appeals of the Sixth Circuit where the District Court was affirmed.

Thus it is, that by action of the Courts below, Plaintiffs were denied any relief and the accounting was held to have been sufficient, and Plaintiffs were held not entitled to any damages on account of the unlawful conversion and detention of their securities.

2. *The Facts as Disclosed by the Record.*

A. *The Formation and History of the Committee and Its Derelictions.*

Spitzer-Rorick & Company, owned and controlled by what hereinafter will be termed the Rorick Interests, consisting primarily of Mr. Horton C. Rorick, his two sons, Marvin H. Rorick and Celian Rorick, James R. Easton and Horton Rorick's brother-in-law, A. V. Foster, were the underwriters of every original issue of Everglades Drainage District Bonds from the inception of this project and the issuance of such bonds, beginning in 1917, through the refunding issue of 1925, which were purchased in blocks and re-sold to the investing public (III-393-394). Beginning in 1926, the District began the breach of its contract with reference to establishing an adequate sinking fund, but nothing was done with reference to such breach prior to the formation of the Committee (II-394-395).

The first coupon default occurred January 1, 1931. About two months prior thereto, and in November, 1930, it was

foreseen that a default would take place. Thereupon, H. C. Rorick, who had dominated every action theretofore taken, and has dominated every action since taken, busied himself to organize what came to be known as the Everglades Drainage District Bondholders' Protective Committee (II-82). As soon as Rorick was notified of the impending default, he got in touch with Lippincott, who was the leading representative of Bioren & Company, and requested a meeting in New York on November 25, 1930. Apparently the only ones there were those representing the Rorick Interests and the Bioren Interests, and an attorney representing a large land owner, the Southern Sugar Company, which later became the present United States Sugar Company. This company also held certain bonds. There may have been other contacts with other bond owners, but the testimony is extremely vague and it is quite apparent that Mr. Rorick appointed himself as Chairman, designated his man Easton, and Bioren & Company designated Lippincott as the other two members (II-83). Shortly after the actual default on January 1, 1931, a meeting was had and these parties consented to act as the Committee, and appointed William Roberts as General Counsel. The actual one-third of the bonds outstanding represented were those represented by the Committee members. That it was a self-constituted, self-appointed Committee, cannot be denied (II-83-84).

The Committee consisted of Rorick, Easton and Lippincott until Lippincott's death in March, 1936, when Senator Joseph R. Grundy was appointed by the Bioren Interests as his successor (II-84).

The Spitzer-Rorick Company, a partnership, was dissolved in 1930, and a corporation was formed, originally called Toledo Municipal Investment Company, which later had its name changed to Spitzer-Rorick & Company, Inc.

In this corporation Horton and Marvin Rorick and Easton owned 85 percent.

The Depositary appointed by this self-appointed Committee and named in the original Deposit Agreement was the Spitzer-Rorick Bank & Trust Company of Toledo, in which the Rorick Interests owned 80 to 85 percent of the stock. Easton held about 10 percent, and A. V. Foster, the brother-in-law held the balance (III-302-306).

Later, apparently Rorick and Foster had a falling out, but it is obvious that Foster had indulged in considerable speculation in the bonds and certificates of deposit (III-513-514).

The Committee Agreement (I-76 *et seq.*) that was drafted by this self-appointed Committee for its own protection is an amazing instrument that not only appoints the Committee but likewise makes the Rorick and Bioren Interests absolute dictators as to successors. The depositing bondholders have no voice whatsoever. Thus, instead of the usual provision with reference to successors being appointed by the remaining members or election by the depositors, this instrument provided that in case H. C. Rorick should die or resign and thus create a vacancy, his successor should be appointed by Spitzer-Rorick & Company; the successor of Lippincott and any subsequent successors to him, by Bioren & Company; of Joseph R. Easton and any subsequent successor to him, by Spitzer-Rorick & Company (I-92). Thus it was that the Rorick Interests saw to it that they would forever have a majority on the Committee and later events proved why it was so desired. This stringent provision was likewise restricted by requiring a unanimous vote of all the then members in order that the Committee might be enlarged.

Stringent provisions were contained with reference to liability (I-93) and with reference to "uncontrolled discre-

tion" of the Committee (I-86-87); however, there was one thing that was certain, and that was that the Committee was given no right to either sell the securities deposited at less than the face par amount, plus accrued interest, or to agree to a plan of composition that would in any manner scale them down from their face value and accrued interest without the consent of the depositors (I-86). Another unusual provision, at this time not found in other Committee agreements (V-1022) adopted at this time was the specific provision that the members of the Committee should be entitled to reasonable compensation for their services. Likewise, provision was made for paying the Secretary to the Committee, agents, employees and Depositary, such compensation as the Committee may approve or agree upon (I-94).

Roberts, the General Counsel of the Committee, was employed December 20, 1930, by Lippincott and Rorick before the Committee was even formed and prior to the date of the Committee Agreement (III-471).

The contention and misrepresentation to bondholders that over one-third of the bonds outstanding had requested the formation of the Committee and requested that Rorick act as Chairman is wholly unfounded (III-396). Approximately $1,826,000 in Everglades bonds were represented by the Rorick and Bioren Interests at the time of the sale of the securities on June 6, 1941. Plaintiffs were denied the right to the original records, and this statement is entirely hearsay evidence (III-388). Apparently, in addition to these, there was another block of $250,000 of the bonds previously owned by H. C. Rorick, which he gave to his grandchildren in 1936 or 1937 (III-388).

At the time of the formation of the Committee, H. C. Rorick was President of the Bank, and later became Chairman of the Board; Marvin H. Rorick, Secretary to the

Committee, was first a Vice-President and later became President of the Bank; and throughout, Joseph R. Easton was a Vice-President of the Bank (III-338-339). Both the Roricks and Easton were partners in Spitzer-Rorick & Company, and stockholders in the successor corporation, Spitzer-Rorick & Company, Inc. Finally, H. C. Rorick admitted that he owned $308,000 in Everglades bonds at the time of the formation of the Committee (III-298).

While we were denied access to the records that would show speculations and dealings by the Committee, and were forced to take Mr. Rorick's word for the fact that the Committee had not so dealt, Rorick admitted that he had no records and did not keep records, but to the best of his recollection he had bought at least $55,000 to $56,000 in bonds or certificates (II-96).

A reading of this Committee Agreement will convince anyone that it was not drawn up in good faith to protect the beneficiaries but had in mind solely and only the granting of unusual and stringent powers to a self-appointed, self-perpetuating Committee, which primarily represented and was interested in protecting its own holdings.

Following the organization of this Committee it engaged in a most flagrant promotional scheme to bring about the deposit of bonds with it. This lasted from 1931 to 1937. During this time, and the record is conclusive, the primary effort and attention of the Committee was spent in this regard: It issued its so-called reports to bondholders and by other devices eventually brought about the deposit with it of some $8,000,000 par value of bonds involved. The particular device used was that of obtaining by a fraudulent agreement with the District, a payment of moneys which then and there should have been immediately distributed and disbursed to the *then* depositors, as provided by and in accordance with the original agreement and the amendment of January 6, 1933 (I-98), but which moneys were set up in

a fictitious distribution account and held thereafter for over six years as a bait to encourage others to deposit their bonds by obtaining the ultimate $20 per bond distribution. In fact the record shows that by the end of 1934 only $823,000 par value of bonds had been deposited—which did not even include all those owned and controlled by the Rorick and Bioren Interests. In the year 1935 alone when a $10 per bond distribution was permitted to all bonds "as and when deposited," the Committee secured a deposit of $5,259,000 in bonds. This practice continued, and a further distribution of $10 per bond offered, and in 1936 $836,000 in bonds were deposited, and in 1937 $785,000 (V-910). The most cursory reading of the Committee Agreement, as amended in January, 1933, shows that this manner of handling bondholders' funds collected by the Committee was wholly beyond the terms of the Agreement which specifically provided that all collections made by the Committee should be held for the account of the depositors in the order in which the coupons, represented by their certificates of deposit, became due, coupons of the same date ranking equally. There was no discretion given the Committee and its sole duty at that moment was to disburse the funds to its then depositors. It had obtained these moneys by payment on a judgment in which deposited bonds and coupons had been merged and only its then depositors had any right thereto.

Dominated by Rorick, and beginning shortly after the formation of the Committee, there was engaged in one of the most amazing, futile and absurd series of law suits and litigation that it is possible to conceive. The number of law suits which Rorick testified to concerning his Committee grew from an original 33 to a total of 45 (Defendants' Exhibit 104—VI-842). The result of all this litigation was nil. He used it to further carry out his promotional scheme to get more and more bonds deposited by his continuous and verbose reports to depositors. Not once was the actual

validity of the bonds questioned (III-470). The sole matter should have been the very simple process of resorting to the Federal Courts to declare subsequent acts passed by the Legislature to be unconstitutional, and to obtain by a very simple and standardized process, tax levy orders that would require the taxes to be placed on the tax rolls. Instead of clean-cut, expeditious and effective litigation, this Committee floundered around for ten and one-half years and actually collected two-thirds of one coupon against the most valuable tax asset ever pledged to support public securities in the State of Florida. Even this collection was not made as a result of final adjudication in contested litigation, but was the result of a fraudulent, friendly agreement entered into between the Chairman of the District Board and the Committee, based upon an assignment of all revenues of the District to the Committee, which was so patently void that their own counsel, Mr. Watson, admitted, "I am so convinced of the invalidity of the assignment however, that I shall not be able to argue to the Court that it is valid" (Plaintiffs' Exhibit 78—VII-1513). Mr. Rorick himself admitted "from a practical standpoint in the amount of collections, we did not accomplish much, as I remember it" (V-1198). This may have been due in part to the utter lack of experience of their General Counsel Roberts in the law of municipal securities (III-471, V-1251) and as admitted by Roberts himself in his deposition (IV-812-813). This failure was, in turn, the cause of failure in the primary, if not sole purpose for the formation of the Committee, namely, to collect the securities or refinance them (IV-814).

The primary duty of the Committee at the very outset was to enforce the payment of taxes to create the fund to pay the bonds. In this duty it utterly failed. It started its general equity suit in 1931, which resulted in an adverse decision by holding that the 1923 Act and not the 1925 Act (the latter increasing the tax responsibility by approxi-

mately $800,000 per annum) applied. Thereupon the Committee, through two clients of Mr. Watson, who were not depositors, arranged to have the so-called Sherrill suit filed in the State Court. This resulted in a decision that the 1925 Act applied (III-406). Although the depositors were never advised of such fact, and in fact specifically advised to the contrary, the Committee failed, because it could not raise $500 to pay the premium, to post a bond to render effective the injunction awarded by the Federal Court in the general equity suit (III-407). The history of the tax levies is a disgrace to those individuals acting as trustees who were attempting to collect securities. There was not a single tax levy made after default in 1931 until by agreement based on the fraudulent assignment of funds, a levy of the 1932 taxes was placed upon the 1935 roll. No levies were made for 1933, for 1934, nor for 1935. The 1935 levy that was made of the 1932 taxes was not put on the tax roll of Dade County (Miami)—one of the most important of all the eleven counties. Again by agreement and not adverse litigation, and again based on the fraudulent assignment, a levy was made in 1936. In 1937 the levy was made on the basis of the Act of the Legislature passed that year, which was clearly unconstitutional, and which had reduced the total tax liability from approximately $2,225,000 to $594,000. In 1938, the 1937 Act was again followed, as it was in 1939. Finally, on January 25, 1938, the Neafie suit was filed that ordered a tax levy on the 1940 roll to include the omitted taxes for 1933 and 1934, and the additional taxes required by the Act of 1925 that should have been levied for the years 1938, 1939 and 1940. Nothing was collected as a result of the Neafie suit because the sale to the Syndicate, hereinafter related, took place prior to the receipt of any moneys (III-418-421).

Again the Committee utterly failed in its duty to promptly reduce to judgment and thereby protect the accrued interest

liability, all past due items immediately they became past due. A suit for judgment was filed May 16, 1931, and judgment entered May 10, 1932 (III-397). No collections were made thereon until the moneys applied under the fraudulent agreement were used and all enforcement writs were issued by stipulation based upon the fraudulent agreement (III-399-400). The judgment in the case filed in the Miami Division was entered without contest (II-177), and some of the moneys collected under the fraudulent assignment agreement were applied to this judgment.

One of the most far-reaching pieces of litigation was the so-called Lassiter suit, in which the Committee did not even intervene, although it was specifically given the right to intervene, the reason being that Mr. Rorick would not subject himself to the jurisdiction of a Florida Court (III-434). The real reason is that he knew he would have to account. The simplicity of requiring tax levies to be made is admitted by Mr. Rorick (III-430), and is definitely brought out in the testimony of Morrison (V-1154-1155). The reason given is that the levy was fixed by the statute, the extension on the rolls each year of a fixed amount was a ministerial duty, there was no question of millage or amount to be levied, and the specific levies were made annually by the Legislative Act itself against specific properties. Nor can this Committee justify the futility of its litigation by saying they were up against a "tougher" problem. The testimony is replete that there is no difference between the Everglades and other situations; the spirit of repudiation was rampant and the testimony of Morrison (V-1119) thoroughly bears out the situation.

Nor did the Committee enforce the judgments it obtained —which was a very simple process by enforcement order in the Federal Courts. The balance due on the only other judgment obtained by the Committee was assigned to the Syndicate at the time of the sale as if no judgment had been

entered, although it included $231,334.30 in interest (IV-652).

A more detailed analysis of the litigation by the Committee will be mentioned hereinafter in this brief when we analyze the matter of compensation.

Another failure of the Committee was that it never presented to the District a definitive plan of reorganization, or attempted in good faith to actually refund the obligations (V-1030). It never made a survey of the District with this in mind and it consistently opposed any re-zoning or readjustment of the tax involved, all of which was done by the Act of 1941 under which the refunding was made possible (V-1267; V-1268). No unit ever admits its ability to pay what it owes (V-1138). Rorick himself admits that the failure to enforce collections was due to the unwillingness and not the lack of ability to pay (III-428). He further admits that it was sound business judgment to reduce items to final judgment as quickly as possible, and only because of the ridiculous negotiations between the District and the Committee were their other suits not pressed (IV-653-655). Although in the same breath he admits that items were not reduced to judgment because of pending negotiations, the deals had long since broken off (IV-655) and the Committee had gone right ahead and prosecuted some of their other litigation in the meantime (IV-657): Although Rorick admits that the Committee refused at any time to consider any re-appraisal, and admits that the Committee never conducted a survey "but had more important work to do" (V-1267-1268; V-1332-1333) it was proved conclusively that this was one of the primary bases for the failure to get together and obtain refunding bonds (V-1121); and this is admitted by Rorick, as disclosed by the letter from Roberts to him (Plaintiffs' tendered Exhibit 46—VII-1439), wherein Roberts advises that Rorick wanted a straight line reduction so as to produce $400,000 in taxes from the District as

a whole. Roberts likewise called attention to a similar statute suggested two years before. No such act was prepared by the Committee, or submitted to the Legislature (V-1266), although the basic act of 1941 did make provision for re-appraisal on the basis of conditions existing now.

Thus it was that the Committee, having accomplished nothing, sold all of the securities on deposit with it to a Syndicate at an amount approximating 33 cents on the dollar of the then enforceable claim against the District. This sale to the Syndicate will be detailed later.

It is thus seen that the Committee not only failed to reduce the items to judgment, and likewise failed to obtain the levy of the taxes to support the bonds, but when taxes were levied it failed to make any effort to purchase tax certificates although it is admitted that such would have been good business and an effective weapon to use. While Mr. Rorick tried to excuse this failure upon the ground that the Committee had no money, the Committee's prior minutes and correspondence showed that arrangements were made, funds were available, and it is admitted that after collections had been made under the fraudulent assignment of 1935, there were ample funds (IV-416, 417; 680-683, 685).

In addition the Committee never offered any definitive plan of refunding, arbitrarily refused to re-zone or refund on the basis of readjusted tax liabilities (V-1266-1267); never conducted a survey "because it had more important work to do" (V-1268; 1332-1333), and thus it was unable to get that which the bondholders wanted, and the Committee knew was best for them, to-wit, long term refunding bonds at a lower rate of interest so as to allow the enhancement in value to enure to the benefit of the bondholders (IV-722; V-955, 1029, 1036, 1037, 1039, 1345).

B. *The Litigation Conducted by the Committee.*

When we analyze the memorandum filed by defendants (Defendants' Exhibit 104, VI-842, *et seq.*) in an effort to

mislead the Court as to the volume of litigation conducted by the Committee, we find that such list is not only fraudulently "padded", but that the litigation actually conducted was of no value whatsoever to the bondholders.

Suit No. 1, listed in the memorandum, resulted in obtaining a final judgment on May 10, 1932, and suits Nos. 4 and 5 are in reality not separate suits, but are merely enforcement orders by way of execution. These did not result as adversary litigation in the obtaining of peremptory orders, but it is admitted that the enforcement orders were entered by stipulation pursuant to the fraudulent and void assignments of District funds that took place in 1935 and 1936 (III-399-400). Thus it is that the judgment obtained in suit No. 1 and payments realized thereon were the result of agreement and not contested litigation.

Suit No. 2 is the so-called "general equity suit" and was filed May 19, 1931. Not only was the interlocutory injunctive order never made effective by the filing of a bond (the reason given being that the Committee was without funds to pay a $500 premium) (III-407), but the reports to bondholders consistently misrepresented that the injunctive order was in effect, whereas not only had it not been rendered effective, but it was actually, by motion under date of December 6, 1932 (VI-727), vacated. The excuse that the money for the premium was not available is ridiculous in view of the fact that the year prior thereto the Committee had borrowed $2500; it had borrowed an additional $2500 in February, 1932, and in fact borrowed a total of $63,000 during the life of the Committee (V-1183), and the Committee knew that the District was operating in a manner that would have been in violation of the injunctive order (V-1184). In fact no injunctive order was made effective in the general equity suit until December, 1939—after all the damage was done—and the suit itself never proceeded to final decree on the merits.

Suit No. 3, being the so-called "collusive" Sholtz case, received nothing but consideration by the Committee because the decision had already been rendered and simply followed the dissenting opinion of the Judge of the Circuit Court of Appeals, who sat in the general equity case in rendering the decision of April 13, 1932 (57 F. 2d 1048). This case held that the Trustees of the Internal Improvement Fund could not use State money to buy in the tax certificates on lands in the District. Apparently all that was done was for Mr. Watson to file certain suggestions in the Supreme Court which resulted in nothing.

Suits Nos. 4 and 5 are, as above mentioned, merely mandamus actions to enforce the judgment obtained in Suit No. 1, and resulted in such writs solely by stipulation, as admitted in this memorandum (VI-848-849).

Suit No. 6, being the Sherrill and Van suit, was a mysterious suit rigged up with some clients of Mr. Watson who were non-depositing bondholders. Just why and how this was all arranged is still a mystery, but it is quite apparent that it was done in order to circumvent the decision of the Federal Court that the 1923 Act and not the 1925 Act governed the amount of tax levies. The 1925 Act had increased by approximately $800,000 (III-406) the levies to be made and the Federal Court had held in the general equity suit that the 1923 Act governed. It was likewise apparently for the reason that the same parties plaintiff would have been met with a plea of *res judicata*. After holding that the 1925 Act applied, the Supreme Court finally three years later and pursuant to stipulation with the District under the fraudulent agreement of April, 1935, issued a peremptory writ requiring the 1932 taxes to be levied on the 1935 roll. Roberts, in his deposition, admits that this was by agreement (IV-826), and no one yet knows just what arrangement was made with reference to the attorney fees for Sherrill and Van, nor has any one yet been able to explain

why the Committee did not appear as parties in this suit, nor why it was not brought in the Federal Court, except the evasive explanation of Roberts that "it was a matter of convenience" (IV-823).

Suit No. 7 was another suit for judgment which really should have been filed not later than 1932 and resulted in the entry of a final judgment November 16, 1936, by agreement (II-177), and not after contest, pursuant to the fraudulent assignment in July, 1936, of the District funds. This judgment resulted in no benefit to the bondholders because it was assigned to the Syndicate as if no judgment had been entered, and the interest merged therein as well as the interest on the judgment after its rendition, was thrown away (IV-652).

Suit No. 7 (a) was a mandamus action that admittedly was never filed because the District agreed under the fraudulent assignment of July 1, 1936, that the taxes for the year 1936 would be placed on the rolls (VI-850).

Suit No. 8 was a suit for judgment that was filed December 31, 1936, and had not resulted in final judgment even on the date of the sale June 6, 1941 (VI-850). It was thereafter dismissed by the Committee, and of course accomplished nothing for the bondholders.

Suit No. 9 is the so-called "Lawler" litigation and nothing was accomplished for the Committee depositors by the vain attempt to prevent the payment of this money under a peremptory writ obtained out of the Supreme Court. It is admitted by Mr. Roberts however that this litigation formed the precedent for the Neafie case which tracked the procedure outlined in the Lawler case (IV-828-829).

Suit No. 10 was really part of the Lawler litigation and the activities of the Committee in regard to that litigation accomplished nothing.

Suits Nos. 11 to 30, being 20 in number, were mandamus actions that were likewise based on the fraudulent assign-

ment of July 1, 1936, went through without contest, and the money was collected virtually and in fact by agreement. For services in these suits Mr. Whitfield was paid some $500, and Mr. Roberts, in his deposition, admits that any portion of his compensation on account of these suits would be very small and the same would be true as to Watson's compensation (IV-830).

Suit No. 31 is the all important *Lassiter* suit which was filed and rendered effective because the Committee and its attorneys had been negligent in filing the *Neafie* suit shown as Suit No. 32. It will be noted that the *Neafie* suit (No. 32) was filed two days too late. The *Lassiter* suit was an all embracing piece of litigation that for all practical purposes placed the District in receivership and prohibited the payment of any funds, but the Court gave the Committee express right to intervene. This right it never exercised with the result that no moneys whatsoever were paid out by virtue of this litigation, but on the other hand the moneys accrued enured to the benefit of the purchasing Syndicate, and the bonds of the Committee were sold without regard to the fact that there was on deposit with the District under the control of the Court in this suit and ready for immediate pro-rata distribution to bondholders, more money than had been collected in ten and one-half years by the Committee (Plaintiffs' Exhibit 68—VII-1483).

Suit No. 32 was an abortive attempt to circumvent the Lassiter suit and was filed two days too late with the result that it accomplished nothing.

Suits Nos. 33 and 34 were ridiculous attempts to sustain the fraudulent assignment of the District's funds and the Committee's own counsel had advised that the assignment was so patently invalid "that I shall not be able to argue to the Court that it is valid" (VII-1513, 1515). The only explanation we can give for these two suits is that Rorick

insisted that they be filed over the advice of counsel and of course they resulted in no benefit whatsoever to the Committee or its depositors.

Suit No. 35 was filed in the name of one Neafie, who was a teller in Rorick's bank, as a non-depositing bondholder and tracked exactly the pattern of the *Lawler* case. This is specifically admitted in the deposition of Roberts (IV-828-829). Finally in 1930 this suit resulted in a peremptory writ requiring tax levies to be made under the 1925 Act for all of the years that they had been omitted due to the negligence and incompetence of the Committee. No collections were realized by virtue of these levies, but the entire matter was thrown aside at the time of the sale to the Syndicate.

Suit No. 36 was the so-called "Adams" litigation in which the Committee finally woke up to the precedent that had been set and employed one Manley Caldwell to represent members of the Committee in their individual capacity. This suit merely declared what the law had always been and merely reversed a lower court decision to the contrary. It was impossible to ascertain the fees paid Caldwell on account of this litigation, but Roberts testified that he and Watson were so busy that Caldwell had been employed as a matter of convenience, and if any part of his fee was allocated to this litigation it was a very unsubstantial part (IV-837). We must conclude therefore that had this litigation been of such tremendous importance the two primary counsel would certainly have been employed in connection with it.

Suits Nos. 37 to 42, inclusive, were filed in the individual capacity of the members of the Bondholders' Committee in the form of six separate suits to foreclose the lien of Everglades taxes. These suits likewise were filed by Mr. Manley Caldwell, and just what portion of his fee was

allocated to them is not clear. It is clear however that no substantial part of the fee to either Roberts or Watson is charged to this ridiculous litigation (IV-838). The decision of the Circuit Court of Appeals, 120 F. 2d 418, shows how utterly fantastic the theory of this litigation was. In fact Mr. Rorick himself admitted in his letter of July 31, 1941, to Caldwell, arguing about Caldwell's fees, that in view of the reversal of the tax foreclosure cases on May 29, 1941, prior to the sale of June 6, 1941,

> "we feel that the Court's decision was detrimental rather than beneficial in closing such sale; for, as you know, we had hoped and expected that this decision would be helpful in securing the settlement under which the present bondholders would receive long time refunding bonds, par for par, and ultimate return of their principal" (VII-1546, 1547).

Thus nothing was accomplished for the Committee or its bondholders by this litigation.

Suits Nos. 43, 44 and 45 were brought against the individual members of the Committee charging them with dereliction in duty, failure to account and seeking to wind up the affairs of the trust. Apparently the general counsel gave little consideration to these cases, Watson handling the two in Florida, and Mr. Fraser of Toledo handling the one in Ohio, for which his firm was paid a $15,000 fee. Obviously these suits were resisted by the Committee as individuals in their own behalf, and accomplished little or nothing for the depositors.

Thus we find from a review of this litigation that no tangible benefit was received by the depositors. In fact Rorick admitted that "from a practical standpoint in the amount of collections, we didn't accomplish much, as I remember it" (V-1198). The total amount disbursed to bondholders as a result of collections made, all of which

were by agreement with the District and voluntarily paid by it, amounted to two-thirds of one six percent interest coupon, or the sum of $20 per bond in ten and one-half years. Again it was admitted by the defendants that their litigation had been futile (III-428).

At no time was the validity of the bonds ever questioned as that matter had long since been settled by prior decrees affirmed by the Supreme Court of Florida (III-470).

It thus became the duty of the Committee at the outset to enforce collection by requiring taxes to be levied by virtue of a simple process (III-430; V-1120, 1138, 1154, 1155). It then should have promptly reduced to judgment all items as they fell due (IV-653-655; V-1119).

The handling of the so-called general equity suit was nothing short of criminal insofar as it protected the rights of bondholders. Although filed in 1931, no injunctive process was effective in said suit until December 19, 1939, although the District had continued to operate under unconstitutional acts, had taken bonds in for taxes (II-100), and otherwise had utilized funds belonging to bondholders for other purposes; and the cause had not even been tried on the merits at the time of the sale ten years after it was filed (VI-725, 729; V-1183, 1184).

Much of the futility of this litigation may be due to the utter lack of experience on the part of the general counsel for the Committee in municipal bond matters. In fact Rorick admitted that "Roberts had very little experience in municipal bond matters" (V-1251; III-471). See likewise deposition of Roberts to the same effect (IV-812, 813).

It cannot be denied that this futile litigation is the basis for the exorbitant fees sought to be allowed for counsel, as well as for the members of the Committee.

C. *Misuse of Funds.*

The misuse of the funds coming into the hands of the Committee fall into three categories:

(1) The fictitious distribution account. The Committee Agreement, not only originally, but likewise as amended (I-76 et seq.), specifically provided, as any such agreement must provide, that moneys collected should inure to the benefit of and be disbursed to the then beneficiaries. See Article II, Section 2 (k) (I-83); as amended (I-98). As so amended, the agreement specifically provided that interest collected by the Committee

> "shall be held for the account of the depositors in the order in which the coupons represented by their certificates of deposit become due, except that all coupons falling due on the same date shall rank equally; • • •" (I-99)

Section 4, as so amended, likewise required said funds to be held for pro-rata distribution to the account of all the depositors whose certificates of deposit represent coupons due on said date in proportion to the amount of such coupons and/or interest on past due obligations represented by their respective certificates of deposit (I-99). Wholly without reference to the terms of the Committee Agreement, the Committee set up a fictitious distribution account beginning in 1935, and held out as bait to encourage others to deposit their bonds a sum amounting first to $10 per bond, and thereafter to $20 per bond "as and when deposited." So flagrant was the misuse of this money that the record shows that $20 per bond was even paid on 557 bonds deposited after the sale of June 6, 1941 (III-272, 324, 325). The effect of this use of the funds is clearly shown by the fact that to and including the year 1934 there was a

total of only $823,000 par value of bonds deposited. When the $10 distribution was held out as bait, beginning in 1935, during that year $5,259,000 in bonds were deposited; and in 1936 $864,000, and in 1937 $785,000. In 1939 there were $149,000, and in 1940 only $64,000 (V-910). Of course the effect of obtaining these bonds by the use of this device was to make the volume on deposit sufficiently large that the Committee would reap a harvest by charging the $35 per bond assessment.

(2) The second category in which the misuse of funds applies has to do with the loans effected from Rorick's bank and the interest paid thereon: At interest rates from four to six percent (II-86), and beginning April 13, 1931, moneys were borrowed from this bank and members of the Committee (although apparently that loaned by Rorick personally, did not draw interest), aggregating a total of $63,500. Upon these, interest was paid to those loaning the money which aggregated $4,358.42. See Plaintiffs' Exhibit 18 (VII-1252), and Defendants' Exhibit 24 (VI-595). With the exception of the first $7,000 borrowed up to 1934, there was never a time that the Committee did not have in its hands ample funds to carry on its work without borowing money from the members of the Committee and their bank. In fact by the end of 1935 the Committee had received approximately $165,000. However, the fictitious distribution account is given as the excuse.

(3) The third category involving the misuse of funds has to do with the disbursal back to the District of $61,-071.05 in debt service moneys, pursuant to the fraudulent assignment arrangements of 1935-1936—all of which money was a sacred trust fund for the sole purpose of paying the bonds on deposit. See Plaintiffs' Exhibit 18 (VII-1252), and Defendants' Exhibits 24 (VI-595), and 53 (VII-751).

The expenditure of this money and its return to the District was not only in violation of the opinion of Thompson, Wood & Hoffman (VI-786), but likewise the opinion of the District Court in the general equity suit (VI-557, et seq.), and it likewise violated the express terms of the Committee Agreement with reference to the disbursal of funds to the bondholders; the bondholders were not advised of such fact and the entire transaction was based upon the fraudulent assignment of funds by the District to the Committee—which counsel for the Committee had said was absolutely void (III-466-468).

D. *Failure to Keep Any Records or Have Its Affairs Audited.*

We submit that this Court will be amazed by the outright admission of these bankers and financiers who handled the affairs of the Committee that they kept no books or records concerning the financial affairs of the Committee, and that at no time were the affairs of the Committee audited by any body. The Secretary-Treasurer of the Committee admitted this in no uncertain terms (III-267, 280). It was admitted that no record, as required by Section 4 of Article VI of the Committee Agreement, had been kept (VII-1031). It was admitted that no books by way of cash book, journal, ledger, or judgment ledger had been kept (III-319); and that the Committee took the report from the debtor District as to the proper application of funds received on account of their judgments (III-320). There was no record kept showing the amount of debt service moneys remitted back to the Board (III-328). The Treasurer was utterly unable to testify as to moneys received from the District, and had kept no record thereof (III-329). There was no judgment ledger showing the application of proceeds received from the District and applied to the judgment (III-329), and

the only record the Treasurer had was the transmittal letter (VII-865) from the Manager of the District as to how much money had been paid (III-330).

No record was kept by the Treasurer, nor was it ever produced, showing the application of moneys received on the second judgment and the Treasurer was unable to recall any record thereof ever having been kept (III-331). He did not even know whether any satisfaction or partial satisfaction of judgment had ever been delivered to the Board (III-331). He did not even maintain a judgment file, let along a judgment record (III-335).

It is no wonder therefore that the so-called account contained in Defendants' Exhibit 24 (VI-595) was so hopelessly inadequate as to make it necessary for plaintiffs to employ a certified public accountant to present to the Court some kind of consolidated balance sheet. See Plaintiffs' Exhibit 18 (VII-1252). For instance, the said Defendants' Exhibit 24 contains no mention of the item of $29,269 which was finally disclosed at the hearing to have been an additional receipt by the Committee (III-279). Nor does the said Exhibit 24 show that out of the fictitious distribution account moneys had been paid on the 557 additional bonds trafficked in by the Committee after the sale (III-272), and that as a result of the final audit by the accountant there was $22,400 left in this distribution account. Nor did said Exhibit 24 make any mention of the $26,650.90, realized by the Committee on the sale of some $72,000 in coupons, the disclosure of which was the discovery of a pencil notation in Rorick's handwriting on the agreement with the Syndicate when it was introduced in evidence (III-450; VII-865).

The recollection of these Trustees as to the manner in which funds had been disbursed evidenced a careless and utter disregard of the rights of their beneficiaries (III-286; V-1277; VI-756).

Not only did the Committee fail completely to ever make an audit of the receipts from the District (III-343), but none of their books, records or documents were ever audited by any body (III-343).

The so-called accounting represented by said Exhibit 24 was admittedly made up from bank statements, letters enclosing remittances, and deposit slips, and no other books of account were kept or used (III-325). With reference to the deposit of the 557 bonds after the sale, no original records were kept with reference thereto although the oral testimony is that a $20 disbursement was made out of the distribution account on each of these bonds (III-324-325).

It is no wonder therefore that there was such violent opposition to the accounting. The Chairman of the Committee admitted that there had been no accounting pursuant to Article VII, Section 2 of the Committee Agreement (VII-1036), nor Article IV, Section 2 of the Committee Agreement (VII-1028). He admitted that the Committee had never rendered an itemized statement of expenses (IV-642-643), and gave as the basis for his refusal to account that this suit for accounting is pending (III-437). The attitude of the Committee is plainly disclosed by Rorick's testimony (III-444-445).

Not only has there been this utter failure to account to any one (II-138), but the record shows a positive deliberate misrepresentation in regard to many of the matters. For instance, there is no showing as to the receipts by the Committee of any charges made direct to bondholders (III-386). There was a misrepresentation to the Court as to the fee of Mr. Grundy until the minutes disclosed that he had refused to accept any compensation whatsoever (III-363-364). There was an utter lack of knowledge as to the actual trust fund parted with under the fraudulent assignments (III-401). It was likewise disclosed that the purchasing Syndicate had been given preferential treatment in making to it an early

distribution "so as to help them carry the bonds they had purchased" (III-441). There had never been any disclosure of the $26,650.90 received by the Committee from the sale of the $72,480 in coupons until the penciled notation was found on the contract with the Syndicate, Plaintiffs' Exhibit 2 (VII-868; III-450), and until that moment there had been a deliberate misrepresentation to the Court as to the amount of money received, and the witness admitted he did not know what happened to the proceeds (III-454); nor were the proceeds from the sale of the 557 bonds deposited after the sale and run through the fictitious distribution account ever accounted for, and the witness could not tell how many of these bonds had had their coupons previously deposited, and he did not see that it was material (III-453). However, he admits that the Committee Report of August 24, 1942—Defendants' Exhibit 22 (VI-552)—did not disclose the sale of these bonds, nor did it show that the Committee had received 52 cents per bond more, and his only explanation was that the report uses "approximate" figures, and admits that all of the figures in that report are merely an approximate summary (III-520). He likewise admits that this same report shows nothing about the proceeds from the excess coupons (III-520); he likewise admits that no separate account was set up as to the moneys received from the sale of these coupons, but that although he is not sure, he thinks the proceeds were carried through the other accounts in connection with the sale of the bonds (III-521).

The obscure accounting rendered has been due solely to the utter negligence of these trustees to keep their records in proper business-like fashion and make those records available to their beneficiaries.

E. The Wrongful Sale and Conversion.

Acting upon the erroneous judgment of the Chairman of the Committee that the money could not be raised to pur-

chase the bonds and that for tactical reasons an offer of sale should be made to convince the District that it had to refund, the Committee under date of April 24, 1941, requested authorization from its depositors to sell the bonds on deposit at $500 per bond, plus interest on that amount from January 1, 1938, at 4 percent per annum (VI-515). This was just ninety days later than the prior report of January 15, 1941 (VI-493), in which the Committee advised that it was convinced that even if the Board should renew its offer of May 17, 1938 (which was the same figure above mentioned), such offer would not be approved. The Committee stated that this was largely due "to the tremendous development now taking place in Southern Florida, and the great jump in the last few weeks, in the demand and market price for Florida Municipal and District bonds" (VII-511). The Committee likewise advised its bondholders that there was no doubt as to the ability of the District to pay $400,000 per annum toward the liquidation of the debt without undue hardship, and that with the continued support of the bondholders an extension or refunding agreement would be eventually obtained (VII-513-514). What took place between January 15, 1941, and April 24, 1941, we shall probably never know, but the fact is that the request for authority to sell was based entirely upon a yielding by the Chairman of the Committee to the demand of the Governor of Florida to obtain such authority (VII-529). The Committee assured its bondholders that it did not believe that purchasers could be obtained at the above price and the only way to convince the Board and State Officials and land owners that this cannot be done is to give them the opportunity to try it out. The Committee therefore recommended that the holders give authority to sell (VII-529).

Apparently based entirely upon these assurances from the Committee it did obtain authority from approximately $7,000,000 of bonds to sell. However, it received no author-

ity from these Plaintiffs. Before realizing where they were in the matter, the Committee found itself enmeshed in a positive agreement to sell under date of May 26, 1941 (VII-1168, 1169, 1170). In fact as early as April 24, 1941, the Chairman of the Committee had advised the Governor of Florida that he was in a position to make such contract of sale (VII-1171). Finally on June 6, 1941, the sale was consummated pursuant to agreement signed that date whereby the Committee sold to a Syndicate, composed of four bond houses, all of the bonds on deposit with it, including those of these Plaintiffs, as to which there was not a semblance of authority to sell (VII-868). The bonds were delivered that day and paid for at the cash figure agreed upon.

That Rorick doubted that the Syndicate could raise the money has never been questioned (IV-621). The reason for the intervention of the Syndicate, as given by Rorick, was the District's "stubbornness and antagonism toward the bondholders" (IV-623). The best reason is that given by Wallis that "neither the Committee nor the R. F. C. chose to have dealings with each other" (V-968). One witness testified that in his thirty years' experience where bonds had been on deposit with Protective Committees, this is the only case he ever heard of where they were sold over the counter to an independant agency, who in turn refunded them and took the refunding bonds, thereby permitting the benefit of the refunding bonds to inure to the purchaser rather than the original bondholders (V-1118). That this was nothing more nor less than an over the counter sale is obvious to any one (V-1150, 1135). The reason the sale was made is due primarily to the failure of the Committee in effecting collections and its lack of ability to offer the bondholders and the District a plan of refunding (V-1030). This sale was made although there was a total of $512,000 made available, including $400,000 for the purpose of meet-

ing expenses incurred in connection with the refunding, at least $112,000 of which was paid to the Syndicate. All of this came from funds of the District which should have inured to the benefits of the Committee's depositors (V-1230-1231). This was not a refunding or reorganization, but a mere over the counter sale (V-1136, 1137-1139).

It is extremely significant also that the deposition of K. M. Throop, Treasurer of the District, shows that on June 6, 1941, there was a cash balance on hand with the District of $274,106.47, of which $263,779.27 was acreage taxes (V-939), and see Exhibits attached to his deposition (VII-1561, 1563); and the Committee did not bother to inquire as to the cash position of the District (V-944). It is no wonder that Rorick expressed concern over a suit for damages in the unlawful conversion of Plaintiffs' securities (III-447).

Another utter breach of trust was to sell the outstanding judgment as if no judgment had been rendered and thus throw away the equity in accrued interest which the bondholders had, and for obtaining which judgment the Committee is now trying to charge its depositors (III-456).

In fact Rorick admitted that the only purpose for the Syndicate was because the District Board had refused to deal with the Committee (III-483). Rorick made this sale knowing that the Syndicate was going to accept refunding bonds when he talked to the Governor on May 6, 1941; this was his understanding all along, and he required the Syndicate to show its contract with the District before he would make a sale (III-522) and permit the Syndicate to get the bonds (III-525).

Nor has there ever been an accounting of the actual moneys received from the sale, but the sole testimony is that it is an "approximate" total (IV-575).

The manner in which the refinancing actually took place was that the R. F. C. loaned sufficient money to take up the

bonds from the Syndicate. This loan was evidenced by the District's note to the R. F. C. and secured by a pledge of the existing bonds. The Syndicate, as such, had no further duties to perform, was paid at least $112,000 from the funds of the District (V-1230-1231), and stepped out of the picture. The District invoked the Municipal Bankruptcy Act with the R. F. C. as the sole consenting creditor. However, the bonds provided for in the Plan of Composition to be issued the R. F. C. were never issued (V-959). The District later entered into a further contract with B. J. Van Ingen & Company, Inc., pursuant to which such company got the ultimate refunding bonds, the proceeds were used to liquidate the note to the R. F. C., and these bonds were then sold to the public by the said purchaser at a handsome premium (VII-1565).

Not only did the Committee in making this sale make no allowance on account of interest merged in their judgments, or on account of interest thereon amounting to $231,334 (IV-652), but the Treasurer admitted he had never even computed the value of these judgments (III-334); nor had any member of the Committee ever computed the total face value of all the securities sold, although it was admitted that each bond represented, principal and interest, the sum of $1800 (III-335), nor is there any valid reason given why the Committee could not have sold direct to the R. F. C. and save the cost of the interim financing for its bondholders (V-1233).

Thus we find a flagrant breach of trust, an unlawful conversion of trust property, and an utter disregard of the rights of the depositors and the duty of the trustees in making this sale.

F. *The Compensation of the Committee, Its Depositary, Counsel and Employees.*

We make no contention that the Committee Agreement did not provide for reasonable compensation to the members of the Committee, the Depositary, Counsel and Secretary (I-94). However, the facts are that the compensation charged is exorbitant and because of the manner of handling the trust and in making the accounting any compensation whatsoever should be denied. This compensation, if any is allowed, should be based upon the actual beneficial services rendered to the depositors and primarily upon the results accomplished. The facts show as follows: That as the result of ten and one-half years of futile litigation, and solely by virtue of stipulations and agreements, and not resulting from any adverse litigation, the total collections realized from the debtor District aggregated $388,172.57 (VII-1252). The Committee then, under the fraudulent assignments of 1935 and 1936, voluntarily returned to the District $118,346.36, of which $61,071.05 were the proceeds of debt service taxes levied solely to support the bonds (VII-1254). The net collected was therefore $269,826.21.

Of this amount the total distribution to bondholders out of the fictitious distribution accounts set up amounted to $172,600, or $20 per bond on 8630 bonds (VII-1253). Thus the bondholders received two-thirds of one six per cent interest coupon as the net result of the efforts of this Committee.

From the proceeds of the sale of the bonds to the Syndicate, and by levying a $35.00 per bond charge (or 3½ per cent), the Committee received $293,831.67. From the withdrawing holders, it levied an assessment and received $8190. It likewise received $405.36 in miscellaneous rebates and refunds (VII-1252-1253).

Thus it is that we may recapitulate in the following manner:

Net collected from District	$269,826.21
$20.00 per bond distribution (8630 bonds)	172,600.00
Balance from moneys collected	$ 97,226.21
$35.00 fee on 8395 bonds sold	293,831.67
$35.00 per bond on withdrawing bondholders	8,190.00
Rebates and refunds	405.36
Total to apply on expense of Committee (VII-1252-1254)	$399,653.24

In other words, for the privilege of being depositors and receiving $172,600 and having their bonds sold at 50 cents on the dollar in an over the counter sale (which actually amounted to only 33⅓ per cent of the total claim due by way of principal and interest), the Committee now seeks to retain from the depositors' moneys the sum of $399,753.24 on account of compensation and expenses, as well as moneys in hand which have never been accounted for.

The compensation and expenses actually paid aggregated $373,442.85.

The difference between the amount retained and the amount actually paid (VI-746; VII-1252-1253) is $26,310.39, which presumably is still on hand with the Committee. $24,050 of this unexpended balance is sought to be accounted for by the fictitious sums alleged to be the "balance allowed but unpaid" up to the time of the trial of this case, as shown by Defendants' Exhibit 51 (VI-746).

To further analyze these exorbitant charges, we call the Court's attention to the fact that the Committee Chairman was allowed and paid $100,800 and the other representative of the Rorick Interests, Mr. Easton, was allowed and paid $25,200, or a total of $126,000. There is absolutely no proof of reasonableness as to these fees except the testimony of

the Trustees themselves. It is little wonder that Senator Grundy broke completely with his co-Trustees and refused to accept any compensation whatsoever. It was not until the Plaintiffs had literally extracted the minutes from the Trustees, long after the hearing started, that it was disclosed that Senator Grundy had written the Committee under date of December 11, 1941, that he had no bill of expense to render and would accept no compensation whatsoever for anything he had done in connection with the affairs of the Committee (VII-1106), and yet to the moment of this disclosure these Trustees had represented to the Court, not only that there was a liability, but that it would be paid; and in fact when Exhibit 51 was filed by the Defendants (VI-746), the same representation was made. Incidentally the Master refused to require production of this crucial letter.

The Secretary-Treasurer of the Committee was allowed and paid $21,000 and the Committee contends he is entitled to an additional $1050. For what, we do not know. As above detailed, he kept no books as either Secretary or Treasurer, except the minute book. There is absolutely no basis in the record for the allowance of any compensation whatsoever to him.

With reference to the Depositary, in order to sustain the exorbitant fee of $40,000 allowed and paid it (it being remembered that the Rorick Interests controlled over 85 per cent of the stock in the Depositary), there was filed an *ex post facto* "bill" consisting of thirteen pages as Defendants' Exhibit 99 (VI-799). It was prepared by the President of the Depositary, who was likewise the Secretary-Treasurer of the Committee between the hearings of this cause, and none of the original evidence upon which it was based was exhibited to the Court, and many of the items were based upon affidavits made as far back as 1931 (V-861-864). In spite of the secondary nature of this padded *ex*

post facto bill, the Master refused any access to any records of the Bank that would support the charges made (V-868). The obvious and fraudulent padding of this claim is patent on its face. It was never submitted by the Depositary to the Committee and never considered by the Committee in fixing the arbitrary payment of $40,000 to the Committee's own Bank. Such items as office rent, light, heat, telephone, janitor and office boy, etc., are as flagrant as is the charge made for the secretaries of the members of the Committee (IV-640), when it was definitely shown that no such items were proper and that the members of the Committee used their own offices and their own secretaries in connection with the Committee business. In a vain attempt to sustain the reasonableness of this charge, the Committee used one Blalog who testified that the charge made was reasonable because he took the schedule of the American Bankers Association, deducted the rental charge and amount of stenographic cost, and then added an arbitrary 25 per cent (V-885). He admitted the unusual manner in which this was handled and stated that his Bank would have entered into an agreement so specific that one could anticipate the charges (V-880). He likewise and most significantly admitted that the fees in Toledo should be less than either New York or Chicago (V-877).

This testimony was completely overcome by Plaintiffs' witness Hurt of the First National Bank of Chicago, whose testimony is conclusive as to his competence and fairness, and he gave as his final opinion that between $20,000 to $22,000 should have been a maximum reasonable charge (V-905 *et seq.;* 915). His detailing of the unusual charges in this padded "bill" is unanswerable.

The confusion between the duties of Marvin Rorick, as Secretary to the Committee and as an officer of the Depositary, is apparent (III-357-358).

Thus we find that the total fees charged by the Rorick erests and their Bank were $187,000 or $14,400 more than s disbursed from collections made to the holders of 8630 nds.

With reference to Easton's compensation, he was paid 00 a month from September 30, 1935, for approximately o years, and it is obvious from the testimony that this s done in order for the Committee to absorb his compen- tion as an employee of the Bank (V-1278). He was terly unable to testify when his salary with the Bank opped and was again renewed (IV-738-740).

A review of the attorneys' fees allowed and paid nine wyers and law firms, shows that $136,738.60 was disbursed, d the Committee contended to the time of the hearing that still owed $15,500 more, or would attempt to sustain as torneys' fees a total bill of $152,238.60—the same being thin $20,000 of the total distribution to bondholders dur- g the life of the Committee from collections made. Again ere is absolutely no evidence whatsoever concerning the asonableness of these charges, except the Trustees, and one instance, the recipient.

As to the general counsel, Roberts, who has been paid 5,000, the Committee Chairman and Roberts testified this as reasonable, but we ask the Court to read the deposi- on of Roberts (IV-751), and particularly the cross-exami- ation (IV-809). Roberts refused to express any opinion s to the services rendered b, Drennan, the members of the ommittee, Caldwell, Baker or Fraser's firm (IV-808). He oes testify that his fees and those of Watson are reason- ble. He admits he was not a specialist in municipal securi- es, nor a general market attorney, and had had no experi- nce in reorganizations involving municipal securities prior o his employment by the Committee (IV-812-813). He ad- itted that the purpose of the Committee was to collect the

securities or refinance them, neither of which the Committee did (IV-814). He admitted that the peremptory writs under which the only collections were made were entered by virtue of agreements between the parties (IV-817). He admitted that no action was taken by the Committee to require the Trustees to buy in the certificates at tax sales from 1928 to 1931 (IV-816). He recalled no opinion ever requested or given in connection with the fraudulent assignment of the District's funds, pursuant to which bondholders' money was transmitted back to the District (IV-818). He had no valid explanation why the general equity suit was allowed to remain dormant from 1933 to 1939 (IV-822). Many of his other explanations as to the use of other bondholders being a matter of "convenience" (IV-823), and resort to the State Courts are unfounded and his lack of knowledge of the actual matters involved is apparent (IV-825). He admitted specifically that the Lawler litigation established a precedent and pattern for the Neafie suit, which resulted in the tax levies of 1940 (IV-828-829). He had nothing to do with fixing Whitfield's compensation, and as to the suits handled by Whitfield any portion of his fee or that of Watson would be unsubstantial (IV-830). Again it was convenience that dictated the Committee's failure to intervene in the Lassiter suit, and no other explanation is given (IV-830-831). He recalled that the suits against Knott, Lawler and others based upon the fraudulent assignments had resulted in no money (IV-835). He was not counsel of record in the Adams litigation, and Caldwell was employed as a matter of convenience, and any allocation of his or Watson's fees to this litigation would be very unsubstantial (IV-837). He knows no reason why the six ridiculous tax foreclosure suits were brought by individuals rather than the Committee, except as a matter of convenience, but did not know why it was more convenient so to do (IV-837). As to these cases he took no part, probably

merely approved the bringing of the suits, and no substantial part of his fee is chargeable thereto (IV-838). The basis for this charge was just a broad general picture. As to the Lassiter litigation, he drafted neither pleadings, nor briefs, and is not sure what part he played—although he did approve the briefs that were filed. He appeared for oral argument in neither the Neafie nor Lassiter suits (IV-839-840). As to the three suits against the Committee, he did not appear as counsel. He does not recall whether he drew any briefs, and he attended no oral arguments or hearings, and does not know what portion of his fee was charged to those suits (IV-840-841). As to the Bechtel suit, Fraser's firm was in command, and a very unsubstantial portion of his fee was charged to that litigation (IV-842).

His lack of knowledge as to Florida refunding operations involving municipal securities was appalling (IV-845-846), and when asked whether the Committee had ever proposed to the Board a definitive plan for the comprehensive refunding on a par for par basis, he answered "I would not say; I don't remember" (IV-850).

He refuses to testify as to the reasonableness of the compensation of the members of the Committee.

Thus when we analyze Roberts' bill for services we find absolutely nothing to support the exorbitant charge made, either in time spent or results accomplished. The same is absolutely true of Watson's bill, and there is no testimony to support the same, except that of the Trustees and his corecipient.

As to the fees in the Neafie litigation, the record is wholly insufficient to support any allowance therefor—we refer to both the Neafie mandamus action and the intervention by Neafie in the Lassiter suit. Rorick stated that Neafie was not the agent of the Committee, nor did the Committee agree to pay his expenses, but they did pay some afterwards

(V-1238-1239); that there was no agreement with Neafie to pay his expenses or attorney fees, although the attorneys for the Committee acted as attorneys for Neafie and "their services were taken into consideration in fixing their compensation" (V-1239). He again testifies that the Committee never agreed to pay Neafie's attorney's fees, but did pay some bills, which included services rendered by the attorneys to Neafie (III-416).

Concerning the fees to Caldwell and Baker, again the record is deplorable. Their primary services were in connection with the *R. F. C.* v. *Adams* litigation, the intervention of Neafie in the Lassiter suit, and the six ridiculous tax foreclosure proceedings. In both the Adams and Lassiter suits fees were allowed by the Court, and Caldwell and Baker received their share. Rorick testified that no part of Caldwell's fee is applicable to services in the Lassiter suit because Neafie had hired him (III-500). However, there was something like $3600 paid to Caldwell and Baker for services rendered in that suit (III-499). The witness thought that Alec Baker was paid $1000 for services in the Lassiter suit (III-517), but he could not be sure without looking it up—which he never took the trouble to do. As finally proved the payment to Baker of an additional $1000, making his total compensation $2000 (VII-1252), was contrary to the oral testimony and was presumably for services in the *Lassiter* case, although the Committee was not responsible therefor, and the Court had awarded Alec Baker his fees in the same manner as Caldwell, who had not been paid compensation in the Lassiter suit for this very reason (IV-639).

It is utterly impossible from the record to ascertain the basis upon which Caldwell was paid in view of the sums that he received under the allowance by the Court in the Adams and Lassiter litigation. Apparently the sums paid

Baker were from Committee funds to keep him "from running out" in connection with some law suits he was handling for the Bank (IV-633-635). The $7127.34 which the Committee finally paid Caldwell (VII-1252) was really on account of the six ridiculous foreclosure suits (IV-636-637). That the decision in these cases, 120 F. 2d 418, was a detriment rather than a benefit is admitted by Rorick in his letter of July 31, 1941, to Caldwell, Plaintiffs' Exhibit 91 (VII-1546-1547), in the following language:

> "The adverse decree of the U. S. Circuit Court of Appeals was rendered May 29, 1941, some time before we made our sale of June 6, 1941, so that we feel that the Court's decision was detrimental rather than beneficial in closing such sale, for as you know, we had hoped and expected that this decision would be helpful in securing the settlement under which the present bondholders would receive long time refunding bonds, par for par, and the ultimate return of their principal."

As to the item of Whitfield's compensation, or that of Denman, we have no quarrel.

As to the compensation of Thompson, Wood & Hoffman in the sum of $1000, it is obvious that this was assumed by the Committee long after the services were rendered for the benefit of the individuals, and the Spitzer-Rorick Company, which was conducting the promotional campaign to get the bonds on deposit.

As to the Fraser compensation of $15,761.26, $15,000 of which was chargeable to the *Bechtel* case alone, we merely submit that there is not an iota of testimony to support the reasonableness of this charge except that of the Trustees who paid it, and it was incurred on account of a suit brought against the Trustees, as individuals, and defended for their own benefit.

We cannot leave the statement of facts concerning the Fraser compensation without calling attention to the re-

markable and almost subornation agreement which Fraser had to sign before he was paid. This was tendered as Plaintiffs' Exhibit 89 (VII-1544), and by it and in consideration of the payment of the fees Fraser agreed

> "that if your Committee is sued for an accounting by any depositor, or any one claiming a right for an accounting, that I will be glad to personally appear and testify, that to my knowledge and in my opinion the affairs of the Committee have been conducted and managed honestly, efficiently and economically, and that the deduction made in the 'Summary of Receipts and Disbursements' in your Report to Depositors of August 24, 1942, of approximately $35.00 per bond to apply on the expenses and liabilities of your Committee, including compensation to the Committee, your attorneys, Depositary, Secretary and other employees is fair and reasonable; and that in case any suit or suits shall be hereafter brought against your Committee or any member thereof, for an accounting or otherwise, that I shall be glad to act as your attorney in such litigation and to make my charges for such services be such an amount as shall be fixed or approved by your Committee.
>
> "I further agree that if any Court of competent jurisdiction decides that the $15,750.00 paid to my firm for my services to the Committee is unreasonable or excessive, that I will promptly re-pay to your Committee any excess found to be due or owing."

Upon the signing of this agreement, Mr. Fraser was paid. Apparently, although due to the failure of the Master to require discovery, we are not certain, Watson refused to sign such an agreement, although it was demanded of him (VII-1540). A similar demand was made upon Roberts (VII-1470), but he refused to stultify himself by signing such an outrageous instrument. See Rorick's reply to his refusal (VII-1471). However Roberts was only paid when he agreed to an arrangement with the Committee to indem-

nify it if it should ultimately be held that the Committee had over-paid him (VII-1462).

As to Drennan's compensation of $10,000 actually paid, and the $500 additional which the Committee contends it still owes him, we merely challenge opposing counsel to show one word in the record to support this gift to the office attorney for the Bank.

In addition to the exorbitant compensation fixed, the Rorick Bank collected $4,358.42 (except a small amount thereof paid one member of the Committee) for interest on loans made to the Committee, all of which after 1935 were wholly unjustified. The miscellaneous expense items amounting to $22,845.83 aggregated alone more than ten percent of the amount actually distributed to bondholders.

In summary, we find therefore that to distribute to bondholders $172,600, the aggregate of expenditures for personal services, Depositary fees and the expenses totalled $350,942.85; and the Committee contends it still owes $24,050, and seeks approval of a total charge of $374,992.85 (VII-1253-1258).

G. *The Fraudulent Fixing of the $35 per Bond Charge Against Depositors*

The Deposit Agreement (I-76), together with the amendment adopted January 6, 1933 (I-98), is clear in contemplating that either depositors who remained with the Committee until the termination of the purposes of the Agreement, or depositors withdrawing, under the provisions permitting such withdrawal, shall have charged against them only the actual expenses and liabilities of the Committee; and that such actual expenses and liabilities shall be prorated among the depositors within the discretion of the Committee. The Agreement is very clear however that the discretion does not consist in fixing either the expenses

or liabilities, but only in determining the manner of a fair pro-ration thereof. Article VII, Section 1 (I-96), provides that upon the termination of the Agreement the depositors shall surrender their certificates of deposit and

> "pay to the Depositary for the account of the Committee such amounts as the Committee, in its sole and uncontrolled discretion may fix as their pro-rata share of the expenses and compensation of the Committee and at the election of the Committee, upon the reimbursement or payment to the Committee of their pro-rata share of all advancements and liabilities of the Committee as fixed by the Committee in its uncontrolled discretion * * *."

Clearly the Committee was not given "uncontrolled discretion" to determine either expenses, compensation, advances, or liabilities, but such were to be an accurate and determined amount and then pro-rated in an equitable manner within the discretion of the Committee among the depositors. Virtually the same provision is made with reference to withdrawal from the Agreement under Article III, under which the Plaintiffs withdrew—or attempted to withdraw. This provides in Section 3 thereof (I-86-87) that:

> "Any Depositor within thirty days after the date of mailing such notice or the final publication thereof, as the case may be, but in no event prior to such date, except as otherwise hereinbefore provided, may withdraw from this agreement, upon surrender to the Depositary of his Certificate of Deposit, and upon paying to the Depositary for the Committee, such amount as the Committee in its uncontrolled discretion may fix as his pro-rata share of the expenses of the Committee to the date of such withdrawal, and at the election of the Committee, such amount as the Committee in its discretion may fix as his pro-rata share of the liabilities of the Committee. And thereupon, such withdrawing

depositors shall be entitled to the delivery of bonds and/or coupons represented by such Certificate of Deposit, or the pro-rata share, as determined by the Committee as applicable thereto, of the proceeds of, or substitutes for, such bonds and/or coupons."

Thus it is clear that the duty of the Committee under this Agreement was to fix and determine accurately and finally its expenses and liabilities and then pro-rate the same among the depositors. The record is conclusive that it did just the opposite. It fixed the maximum amount which it thought the traffic would bear and then, by an amazing course of negotiation and dealing between the Chairman and the others interested in the "loaf of bread", split it between them. Not only this, but the Chairman actually misrepresented to the purchasing Syndicate, to his counsel, and to his Co-Trustee, Grundy, that the charge was going to be three percent instead of three and one-half percent (making a differential of approximately $42,000) in order thereby to get reductions in their claims for compensation so that the bulk of the limited fund would inure to him, his immediate business associates, his son and his Bank. The record references in support of these statements are set forth in the details hereinafter related.

With reference to the fraudulent manner of fixing the three and one-half percent charge to these Plaintiffs, Plaintiffs' Exhibit 8 (VII-1165) shows that by letter under date of May 21, 1941, a depositing bondholder was advised that the assessment or fee would be three percent. When these Plaintiffs gave their notice of withdrawal on June 30, 1941, they were advised that the fee or assessment had been fixed at $35 per bond, and in Rorick's letter to Grundy of July 10, 1941, Plaintiffs' Exhibit 29 (VII-1403), Rorick states that

"we finally wrote Mr. Kelley the 'mechanics' necessary to enable him to withdraw, including the payment

to the Depositary for the Committee of his pro-rata share of expenses and liabilities of the Committee up to date, which we stated that the Committee had fixed at $35.00 per bond to be paid by withdrawing depositors. *We thought this would prevent Mr. Kelley from proceeding further,* but on July 3rd we received a telegram from him asking to whom to send the money, at which we were greatly surprised. * * *

"Of course, if we only charge our other depositors three percent we might have to pay back to Mr. Kelley the extra one-half percent, which Easton and I fixed on July 3rd, as per enclosed certificate, to protect our Committee *and to prevent Kelley from withdrawing.*"

The actual manner of determining the assessment to be levied against the bondholders is stated clearly by Mr. Rorick himself (III-270). He states positively that they fixed the amount and then determined the expenses and liabilities, and he admits that this was done without his ever having figured the actual cost to bondholders (V-1338); he admits that he never computed the cost per bond, that he did not see the necessity of figuring out the cost, and yet he was constantly and fraudulently representing to his depositors that their total cost was $35 per bond, less the $20 distribution theretofore received, or a net cost of $15 per bond, and that no itemized statement was ever prepared "because it was too stupendous" (IV-643, 644, 647). That this representation was absolutely untrue is shown by the uncontroverted computation made by the accountant in Plaintiffs' Exhibit 21 (VII-1258), where the actual cost per bond is shown to be $63.11.

Nor had his Co-Trustee Easton ever computed the actual cost to holders, and did not know that it ever had been computed (IV-720).

The admission is again made in the record as to the manner in which the arbitrary assessment was made (II-179).

Likewise the Chairman admits that all the Committee did was to give the depositors "our best estimate and submit it to them" (III-491). It was shown that there was no basis for the increase from $30 per bond on May 21, 1941 and the $35 per bond set as of June 6, 1941 (III-495). It is shown likewise that there was absolutely no effort to determine the liabilities prior to fixing the fee, but that it was a mere arbitrary action (III-272). In fact at the time of the hearing Rorick had not even determined the exact amount of certain "incidental" expenses (III-274).

The Depositary had never rendered any bill, and no liability on its account was determined until December 17, 1941, when another arbitrary decision was made allowing the Trustee's Bank $40,000 (III-385).

In fact until December 19, 1942, the Committee had no idea where it stood with reference to its liabilities (VII-1105).

That the Chairman of the Committee likewise misrepresented the matter to counsel is conclusively shown by his letter of July 8, 1942, Plaintiffs' Exhibit 57 (VII-1463), wherein Rorick advises his counsel that as late as December 5, 1941, the Committee had decided that it would be unwise to undertake to fix the compensation of the Committee and its employees, and quotes from a vital letter received from the Syndicate Managers under date of May 18, 1942, as follows:

> "We (the Syndicate) proceeded on assurances from you that the Committee's charges would not be over three percent, and if they try to collect a larger amount it is our opinion they will meet with a flood of protest. Furthermore, whenever any Committee has tried to collect exorbitant fees the Government agencies have called the matter up for investigation."

This misrepresentation by way of assurances to the Syndicate that the charge would be three percent explains

the minute entry of the minutes of August 21, 1942 (VII-1113-1115), which recites that the statement therein set out had been fully discussed with Mr. Ranson (a member of the Syndicate) and that Ranson had said he was willing to approve the above statement and the charge or deduction of *approximately* three and one-half percent, or $35 per bond, and was sure that John Nuveen & Company (another member of the Syndicate) would also approve this charge, and he would recommend to the other members of the Syndicate in New York that they also approve it. Thus it is that some kind of deal was made with the Syndicate and the charge was fixed because it agreed, and not on the basis of an honest and bona fide determination of expenses and liabilities. This agreement of the Syndicate was made necessary because of the prior assurances and misrepresentation that the fee would be three percent; probably the most illuminating document on the manner in which these Trustees acted is the letter of June 17, 1941, written by Rorick to Roberts—Plaintiffs' Exhibit 48 (VII-1442), wherein he discusses the difficulty in "dividing the loaf" fairly. He goes on and says:

> "We have refrained as yet from making any absolute commitment to depositors as to amount of deductions to be made from proceeds of sale, so as to obtain a more definite understanding as to the amount of our liabilities, but we are in hopes of being able to satisfy every one out of the proceeds of a three percent assessment. * * *.
>
> "While I have given considerable thought to the difficult question of apportioning an assessment of *three percent,* yet I thought it would not be fair to form a definite decision until after first hearing the view of the parties interested with a statement of their services. In my preliminary computation I was in hopes that it would be satisfactory to you to now send you $25,000 and your cash expenses to date, in addition to the

$25,000 which we paid you in 1937, and to then send you $10,000 additional in December, which would make a total of $60,000 for services in addition to your cash expenditures. Please advise whether this would be satisfactory to you under all the circumstances.

"I enclose copies of two very fine letters from Governor Holland and his wife written on the 12th Inst., together with copies of my today's replies. I also enclose copy of my yesterday's and today's letters to Mr. Watson. In this connection I would appreciate your opinion as to whether you think it would be fair to Mr. Watson to now send him $15,000, in addition to the $15,000 he has already received, together with his cash expenditures, and to then send him $5000, or possibly $10,000, more in December. You, of course, have about the same means of knowing the extent and value of his services as we have. You also know the nature and extent of the services rendered by Senator Grundy. Please advise whether you think the payment of $5000 for his services, with a liberal allowance for his cash expenditures, would be fair. If you think any of the above suggested fees are unfair we shall greatly appreciate an explanation of your ideas as to what you think would be fair. Of course, none of us will receive all that we feel we are entitled to; but in these days of critical investigation of Committees and their charges, we have to be more conservative and economical than in the 'old days'.

"I enclose copy of letter just received from one of our depositors, Alfred Hoffberg, of your city, which shows that some of our depositors are very much dissatisfied with receiving less than 33 percent of what is legally due them and some of them are going to strenuously object to paying us very much for our services."

As late as December 5, 1941, Plaintiffs' Exhibit 32 (VII-1414), Rorick writes to his Co-Trustee that the charge to be made to depositing bondholders

"has not yet been definitely fixed or determined. We have heretofore thought it unwise to attempt to fix this

charge before we know whether withdrawing depositors, or other depositors, intend to sue our Committee for an accounting of our expenditures and the result of such suit or suits."

To show the manner in which these Trustees dealt, we quote the following pertinent passages from a letter under date of July 14, 1941, from Rorick to his Co-Trustee Grundy (VII-1407):

"While we think the Committee can possibly obtain a better settlement with Mr. Roberts and Mr. Watson by postponing such settlement until the entire amount agreed upon is paid, yet it has been our desire to treat them, and every one else employed by our Committee, fairly rather than to drive the best bargain possible; * *.

"Mr. Easton and I are of the opinion that the affairs of the Committee should be conducted as heretofore and that discussions as to the amount and payment of fees and expenses is now in order. * * *

"All of the foregoing (the Committee, its Depositary, attorneys and employees) have contributed to produce the loaf of bread which should be divided fairly and equitably between all of the above parties (we hope we don't have any other claimants like Heilbron, Goetz and other gyppers). While the responsibility for making a fair and just distribution will rest largely upon my shoulders, yet I will appreciate your consideration and cooperation in coming to a fair and just decision. Will you kindly write me how you think the loaf should be divided on the basis of it being composed of *three percent* on the face value of the bonds deposited, and in the case of your own allowance or 'slice of bread' please state the smallest amount of 'dough' with which you would be satisfied under all the facts and circumstances in this case. * *

"In other words, while we greatly desire your approval as to all of the acts of the majority of the Committee, we do not recognize that you have any veto

power or right to dictate as to what acts of a majority shall become effective and operative."

It is hardly any wonder that Senator Grundy not only refused to accept any compensation or reimbursement whatsoever, but wrote to Rorick under date of July 28, 1942 (VII-1420), advising that he had consulted his private counsel whom he wished to in turn consult with Mr. Roberts, and his private counsel had asked him to secure for his examination a copy of the minutes of the Committee

> "and an accounting of Committee expenditures and disbursements paid covering the period since the sale of the bonds, and accordingly I should appreciate it very much if you would forward this information at your earliest convenience."

This letter from Grundy was answered by telegram under date of July 30, 1942, from the Chairman (VII-1423):

> "We think it unnecessary and inadvisable to attempt to furnish your personal attorney with the papers and statements you requested, as our Committee must rely upon our own counsel who are fully informed and competent."

In answer to this, the final break with Grundy came on August 4, 1942, when he wrote Rorick (VII-1424) as follows:

> "I am unwilling to approve any final distribution until all claims against the Committee have been disposed of and our liabilities, if any, also disposed of. I also feel that the compensation of the Committee, if any, should be made known to the bondholders with opportunity to them to object, before payment is made, or that the reasonableness thereof be determined by a court of competent jurisdiction.
>
> "I would suggest for your consideration that if you wish to make distribution at this time a detailed account should be prepared and sent to all of the depositing

bondholders, including a full statement of the expenses of the Committee and the proposed compensation, if any, of its members, with the further advice that if no objection to the account is filed with the Committee within a period of thirty days, distribution of the balance indicated on the account will be made forthwith."

Of course no such proper action was taken, Rorick continued to handle the affairs of the Committee as he saw fit, and to this day has not made an accounting to his depositors, as required by every principle of equity.

Further, it is obvious that when there is a limited fund, all that can be deducted from the claims of others will inure and did inure to the Trustees.

As to this three and one-half percent charge being exorbitant, we call the Court's attention to testimony of Plaintiffs' witnesses that one percent of the bonds on deposit would have been ample compensation for the members of the Committee (V-1005), and that a total of two and one-half percent would have been a reasonable charge for services rendered (V-1019-1021). This testimony is amply supported by Plaintiffs' Exhibits 19 and 20 (VII-1255-1256), showing the average charge in refunding operations in Florida as approximately two and one-half percent. It is likewise shown that with the exception of four municipalities every refunding operation was on an exchange basis with the original holders providing for a par for par exchange, and the bonds are now selling above par (V-1007-1018).

Again the attention of the Court is called to the fact that while the final assessment was $35 per bond, the total cost to the bondholders was $63.11 per bond. See Plaintiffs' Exhibit 21 (VII-1258), and testimony of the accountant (V-1060).

II. The Unlawful Conversion and Malicious Refusal to Return Plaintiffs' Securities.

A chronological statement of the facts in this regard should be sufficient to show conclusively that the Trustees wrongfully converted Plaintiffs' property and maliciously refused to return it:

(1) On June 6, 1941, without semblance of authority, an absolute sale to outside parties was made of Plaintiffs' securities. While the agreement of sale divided the bonds into two classes and made a conditional sale as to the second class, only one of Plaintiffs' bonds was in that class, and an absolute unconditional sale was made of the others (VII-1522).

That the agreement, not only failed to authorize, but expressly prohibited any such conversion of the bonds on deposit is admitted. No plan or agreement which involved any kind of a compromise, scaling down or reducing of either principal or interest could become effective, nor did the Committee have power to take any such action pursuant to any such plan or agreement, except in accordance with the provisions of Article III (I-85). Section 2 of Article III specifically provided that in case, either with or without a plan and agreement, the Committee shall have determined to sell any part of the securities deposited with it except for an amount equal to the face principal and interest due, a copy of the plan and agreement or a statement of such *proposed* sale was required to be lodged with the Depositary, and notice of the sale given to all depositors (I-86). Depositors were allowed thirty days after mailing of such notice to withdraw under the provisions of Section 3 of Article III (I-86). These express terms of the trust agreement were avowedly violated in every particular, the sale was consummated and the bonds delivered and paid for before these Plaintiffs had even the semblance of a notice.

A more flagrant violation of trust by a conversion of the trust property cannot be conceived.

(2) Under date of June 7, 1941 (VII-1308), although not actually mailed until June 11, 1941 (VII-1327; IV-662), the depositors were notified that the sale had actually been consummated but under the subterfuge of compliance with the agreement by a proposed amendment thereto, were advised of their rights to withdraw. Under the terms of Section 3 of Article III (I-86) this gave depositors until July 11, 1941, to withdraw.

(3) On June 30, 1941, Plaintiffs served formal notice of withdrawal on Defendants (VII-1313).

(4) On July 2, 1941, Defendants advised Plaintiffs of the "mechanics" necessary to effect the withdrawal. This is the advice concerning which Rorick wrote to his Co-Trustee Grundy on July 10, 1941, as follows:

> "We finally wrote Mr. Kelley the 'mechanics' necessary to enable him to withdraw, including the payment to the Depositary, for the Committee of his pro-rata share of the expenses and liabilities of the Committee up to date, which we stated that the Committee had fixed at $35.00 per bond to be paid by withdrawing depositors. *We thought this would prevent Mr. Kelley from proceeding further,* but on July 3rd, we received a telegram from him, asking to whom to send the money, *at which we were greatly surprised.* * *
>
> "Of course, if we only charge our other depositors three percent we might have to pay to Mr. Kelley the extra one-half percent, which Easton and I fixed on July 3rd, as per enclosed certificate, to protect our Committee *and to prevent Kelley from withdrawing*" (VII-1403, 1406).

(5) On July 3, 1941, withdrawal fee was forwarded to Defendants in accordance with Defendants' instructions (VII-1320).

(6) On July 7, 1941, Defendants demanded a release of all liability as a condition to the delivery of the securities by advising Plaintiffs that the Committee would

> "require you and any other withdrawing Depositors to deliver a release of all claims under the Deposit Agreement upon the delivery of the securities to which withdrawing depositors shall be entitled. Please advise us promptly whether you are willing or unwilling to give such receipt or release" (VII-1326).

(7) On July 15, 1941, the Chairman of the Committee received the advice of his general counsel, Roberts, as follows:

> "In your letter you stated that you are inclined to believe that under the Deposit Agreement Kelley would be entitled to withdraw these bonds. I agree with your conclusion" (VII-1452).

(8) Prior to receiving the advice of his counsel, and on July 10, 1941, the Chairman advised Plaintiffs that their bonds had been sold (which was the first advice given them as to the conversion), but offered substitute securities (VII-1327).

(9) On August 5, 1941, Defendants advised Plaintiffs that their bonds had been pledged or sold by the Syndicate to the Reconstruction Finance Corporation and Defendants were trying to get them back (VII-1334).

(10) On August 29, 1941, and again on September 8, 1941, Defendants advised Plaintiffs that they have obtained the return of their securities and are ready to deliver them to Plaintiffs upon the following unlawful condition:

> "We therefore feel it is our duty, as such Trustees, to require from you, as a withdrawing depositor, a written release of all claim under the Deposit Agreement

upon delivering to you the identical $172,000 bonds and coupons, and assignment of part of the final judgment * * *." (VII-1341-1343.)

(11) On August 19, 1942, counsel for Plaintiffs wrote to the Chairman of the Committee outlining in full their prior correspondence, and showing that the Trustees ignored and failed to reply to repeated communications and demanded that the Trustees surrender and deliver Plaintiffs' bonds. Counsel likewise advised that Plaintiffs would not execute any kind of release, but that if the members of the Committee would submit a full statement of receipts and disbursements itemizing all expenses of consequence and unequivocally state that all persons who had deposited bonds were treated on an equal basis without direct or indirect benefit or disbursement not made available to all depositors, and that no member of the Committee, his relatives or business associates had received any benefit or profit from the business of the Committee, other than as a depositor, he would examine such statement with his clients and if everything should be found to be in order Plaintiffs might see fit to give a release. Counsel likewise put the Trustees on notice they will be held strictly accountable for damages for failure to deliver the securities (VII-1348-1352).

(12) On June 14, 1943, demand was again made for the return of Plaintiffs' securities, which demand was not complied with (VII-1357).

(13) Again on September 2, 1943, the demand for the return of the securities and a specific demand for an accounting by the Trustees was made by all Plaintiffs (VII-1288-1289).

(14) The demand of September 2, 1943, was again refused, unless a release (VII-1289) was delivered by Plain-

tiffs to Defendants, the form of which release is shown in the record (VII-1290).

(15) On November 1, 1943, this suit was instituted (I-2).

(16) On April 28, 1944, the District Court entered its order requiring and directing the Defendants to deliver Plaintiffs' securities to them, and held that Defendants had no right whatsoever to demand as a condition precedent to such delivery, the execution of a release from liability (I-117). See also memorandum on Plaintiffs' motion for judgment on the pleadings (I-112-116).

(17) Although the order of April 28, 1944, should have been complied with on or before May 28, 1944, it was not until May 31, 1944, that the Defendants finally delivered up Plaintiffs' property to them, and then only after notice had been served that Plaintiffs would apply for a citation for contempt (VII-1291).

The foregoing statement should be sufficient to show the wrongful conversion and malicious detention of the trust property. However the motive which actuated the Committee is shown to be, by their own admissions in writing, two-fold:

(a) The Committee realized that if these bonds were placed on the market they would bring more than the Committee had gotten for its own depositors and cause embarrassment to the Committee.

(b) The Committee was cooperating with the District and its representatives in an attempt to make it more difficult for the Plaintiffs to resist the District, and attempted to collect from it what the bonds were really worth. Thus Rorick writes to his counsel, Watson, on June 19, 1941:

> "While it will take considerable time and some tact and ability to handle these 'dissenters', yet we are not

> very much worried, as for the first time during the past ten years, we have the 'money in the till', or the ammunition ready to fight if we have to'' (VII-1511).

In other words, the Trustees will use the trust funds to fight their own beneficiaries.

Again on December 21, 1942, Rorick writes to his counsel advising that negotiations had recently been renewed with reference to the District settling on the plaintiffs' securities, and added

> ''but the Governor refused to approve without first securing my consent as he realized that the payment to non-depositors of larger amounts than was paid to the Committee for their bonds would be a reflection upon the services and accomplishments of our Committee, and he asked me how I felt about it. I not only told him in person, but last week confirmed it by letter, so we will be greatly surprised if any such settlement is made. Please treat the Governor's discussion with me as confidential.'' (VII-1542-1543.)

. Thus the Trustee was cooperating with the Governor of Florida, whom he had theretofore identified as ''the specially-appointed all-powerful agent of the Everglades Board'' (V-1234), in an effort to prevent the beneficiary of the trust from receiving the maximum amount possible for his securities because it might embarrass the Trustee for having taken less on behalf of other beneficiaries.

IV

Specification of Errors Intended to Be Urged

That the Circuit Court of Appeals erred in the following respects:

1. In holding that the Respondents had measured up to the standard of conduct prescribed for trustees and fiduciaries.

2. In holding that there had been such accounting as is required by fundamental rules of equity.

3. In holding that Petitioners' rights of discovery had not been denied.

4. In affirming the District Court in its consistent violation of rules of evidence by refusing admission of competent relevant and material documentary evidence, and by relying upon secondary and hear-say evidence when the best evidence should have been produced.

5. In affirming the District Court's consistent denial of access by Petitioners to original records and documents involving the administration of the trust and in its acceptance of secondary and hear-say evidence in lieu thereof.

6. In affirming the District Court's refusal to deny or drastically reduce the compensation of the trustees, their depositary, counsel and employees.

7. In affirming a failure of the District Court to require the trustees to account for funds actually on hand and to make proper disposition thereof to their beneficiaries.

8. In affirming a refusal by the District Court to decree a return to Petitioners of the fraudulently-fixed assessment levied against them upon the withdrawal of their securities.

9. In holding that Petitioners were not entitled to damages for the unlawful conversion and detention of trust property by their trustees.

10. In holding that the District Court, in the face of the obscure accounting that was made, had not erred in failing to order a thorough audit and appoint a successor trustee whose duty it would be to make such audit and fully account so that the rights of all beneficiaries might be protected.

V

ARGUMENT

Question No. 1: Were Respondents held to the standard of conduct and their strict liability to account to which they were subject as Trustees of an express trust; and were Petitioners consistently denied their rights to a full disclosure by and discovery from Respondents, as provided generally by the rules of equity, and particularly by the Federal Rules of Civil Procedure?

In summary, Petitioners contend that Respondents were neither held to the standard of conduct nor to their strict liability to account, and that Plaintiffs were consistently denied their rights to a full disclosure by and discovery from Respondents as provided generally by the rules of equity, and particularly by the Federal Rules of Civil Procedure.

While this question assumes a dual aspect, it really grows out of the standard of conduct from time immemorial imposed upon trustees. Their liability to account and the correlative right of a beneficiary to discovery is merely a portion of the process by means of which the Court may ascertain whether that standard has been met.

It is earnestly contended that even in the face of the obscure accounting that was required, the record is replete with instances of utter failure of these trustees to meet the standard. Had a full, complete and accurate accounting been enforced by the Court, only these trustees know to what extent their derelictions might have been proved.

There has hardly been a better judicial expression than the classic words of Mr. Justice Cardoza in *Meinhard* v. *Salmon*, 249 N. Y. 458, 164 N. E. 545, 62 A. L. R. 1:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to

those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this Court."

This language has been approved by this Court in *Woods v. City National Bank & Trust Co. of Chicago*, 312 U. S. 262, 85 L. Ed. 820, 61 S. Ct. 493.

On the basis of this fundamental underlying fiduciary responsibility, it has consistently been held that it is the strict duty of a trustee to keep and render a full and accurate record and accounting of his trusteeship to the *cestui que* trust, and that this duty will be strictly enforced by the Courts. 54 Amer. Jur. page 396, Sec. 497.

Restatement of the Law of Trusts, Vol. 1, Sec. 173, states the rule as follows:

> "The Trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers, and other documents relating to the trust."

It may be stated as axiomatic that whenever a trust relationship is made to appear, the requirement of a full, complete and accurate accounting follows as a matter of course.

The fundamental error running throughout the entire proceedings before the Master, as confirmed by the District Court, and affirmed by the Circuit Court of Appeals, was based upon the erroneous assumption that we were engaged in an adversary proceeding instead of a suit brought by a beneficiary for an accounting from the trustees of an express trust; in such case the entire burden of rendering a full, accurate and complete accounting and disclosure should have been enforced regardless of the technical issues involved, or the parties to the record.

At the outset of the hearing, the Petitioners were limited in their right to an accounting to the arbitrary date of July 1, 1941, although their securities had not been delivered to them until May 31, 1944, and all sums were moneys which had come into the hands of the trustees when it is admitted Petitioners were beneficiaries. The withdrawal was not completed and the termination of the trust relationship not accomplished by the express terms of the Deposit Agreement until there had been a delivery to and acceptance by Petitioners of the deposited securities. Article VI, Section 6 of the Deposit Agreement (I-94).

Section 2, Article VII of the Deposit Agreement specifically enjoined upon the Committee the duty to file with the depositary a complete accounting (I-96). No accounting was ever made under this provision, and the only excuse given was that this suit for an accounting was pending, although the purposes of the agreement had been fully accomplished when all bonds were sold on June 6, 1941 (III-437; II-138).

It is obvious why the Committee Chairman refused to deliver Petitioners' securities until a release was given, and the very reason such release was not given was because there had never been any semblance of an accounting to Petitioners. It has been held legal duress for a trustee to

refuse to turn over trust property to a beneficiary rightfully entitled thereto except upon condition of signing a release. *Ingram* v. *Lewis*, 37 F. 2d 259.

Rorick's co-Trustee Grundy recognized this duty when he wrote Rorick on August 4, 1942 (VII-1424) as follows:

> "I am unwilling to approve any distribution until all claims against the Committee have been disposed of and our liabilities, if any, also disposed of. I also feel that the compensation of the Committee, if any, should be made known to the bondholders, with opportunity to them to object, before payment is made, or that the reasonableness thereof be determined by a court of competent jurisdiction.
>
> "I would suggest for your consideration that if you wish to make distribution at this time a detailed account should be prepared and sent to all of the depositing Bondholders, including a full statement of the expenses of the Committee and the proposed compensation, if any, of its members, with the further advice that if no objection to the account is filed with the Committee within a period of thirty days distribution of the balance indicated on the above account will be made forthwith."

As to any balance on hand the Petitioners are, by the provisions of Section 2 of Article IV of the Deposit Agreement (I-89), entitled to their distributive share.

Not only did the Master and the District Court confine the accounting to an arbitrary date, but they likewise consistently denied every effort made by counsel for Petitioners to bring about a complete disclosure. At the outset of the hearing it was obvious that the Master had misinterpreted the issues and the Court was promptly moved for an order instructing the Master as to the meaning of his prior orders and instructions, which motion was filed June 8, 1945 following the initial hearings which began April 21, 1945. The Court did not have time to hear this

motion (III-309), and it was not ruled upon until almost ten months later, namely, March 15, 1946, during which time the hearings had been completed (I-152).

Subpoenae duces tecum were issued at the outset (I-129-133); further *subpoenae duces tecum* were issued later, to-wit, in October, 1945, calling for specific items (I-143-149). Motion after motion after motion to produce original records and correspondence were made, some of which are hereinafter detailed. A request for admission of facts was filed (VII-1285). A written tender in evidence of those letters which had been reluctantly produced and screened by the Master, being Plaintiffs' Exhibits 26 to 93, inclusive, was made and denied (VII-1397 et seq; 1553). A specific motion was made to produce the correspondence specifically replied to in those letters, which were necessary to make the same complete (I-149), which motion was denied (I-241).

The record is replete with instances wherein were utterly ignored, not only the fundamental rules of evidence, but primarily the rules surrounding and safeguarding beneficiaries in enforcing the duties of a trustee to account. A few of the most flagrant of these instances may be detailed as follows:

Hear-say evidence was constantly allowed as to the contents of written instruments without requiring the latter to be produced (III-273).

The Defendants were not required to ever produce a single original record of the Depositary. The basis of the ruling was the childish objection that these records would disclose the names of the bondholders. If these names were of benefit to the Plaintiffs, then either the Bank or Spitzer-Rorick & Company were obtaining the benefit by knowing the contents of such records (III-317, 319).

The Master, instead of requiring production of the original records of the Committee and Depositary, took the

contract entered into with the Syndicate as conclusive evidence concerning the bonds on deposit (III-318).

The Master refused again to require the original books of the Depositary to be produced (III-320).

The Master refused to require production of the original records which showed the receipts of the Committee from the $35 assessment levied (III-321-322); and again failed to require the production of original records (III-281).

The Master failed to require production of the answers received by the Committee to its questionnaire transmitted by it to bondholders—Defendants' Exhibit 15, 15-A (III-339), as well as the correspondence received from the thirteen favored bondholders mentioned in the Committee's letter of January 15, 1941, being Defendants' Exhibit 18 (III-341).

When the minute book constituting the only record whatsoever of the formal actions of the Committee was finally produced, the Master divided it in half (III-343) and permitted only that portion to July 1, 1941, to go in evidence. This is Plaintiffs' Exhibit 3 (VII-906).

The remainder was tendered in evidence, but its admissibility was denied by the Master—although a cursory reading will disclose vital materiality of the matters therein contained (VII-1105 et seq.).

As to the amount of money received for the bonds, a witness testified that he made a memorandum from a memorandum he had in his file at the time of the sale which he then verified with the books of the Depositary. The motion to produce the said books was denied (III-347).

The Court again failed to require the production of the original records of the Depositary, even though they were alleged to be intact (III-351, 352, 354).

The Court sustained an objection to any testimony as to the balance on hand with the Committee, although under

the specific terms of the Deposit Agreement withdrawing depositors have an equity therein (III-347-350).

The Court again excluded the minutes of the Committee subsequent to July 1, 1941 (III-362). The Court refused to require production of correspondence between the Committee and its counsel upon the unwarranted ground that such communications are privileged (III-362).

The Court refused to require the production of correspondence between members of the Committee and their counsel subsequent to July 1, 1941, with reference to the payment of compensation and fees, but required it to be first screened by the Master (III-374); following such screening the formal tender was made of Plaintiffs' Exhibits 29 to 93, inclusive (VII-397), and we beg of the Court to read this amazing correspondence in full as it reflects the true motives and attitude of these Trustees.

The Court refused to fix a time for response to subpoenae and order to produce (III-377). The Court consistently required that we take oral secondary evidence of the Roricks as to the facts and figures involved, and the record is replete with errors, some of which were attempted to be corrected on the basis of further secondary evidence (III-382).

The Court refused to require the original records of the Depositary to show the volume of securities on deposit for the absurd reason that such records might disclose the names of the depositors. In this connection we respectfully urge the Court to read Volume III, pages 381-385 of the record. This basis for ruling as to disclosure of the names of the bondholders or depositors was shown to be wholly without foundation (V-1026), and in fact Rorick himself definitely admitted that the records of the Depositary would neither reflect nor be a true representation of the present ownership of the securities (III-443; V-1249-1250).

The Court refused to require proof as to the ownership of the 557 bonds deposited with the Committee after the sale and run through the fictitious distribution account so as to collect $20 per bond thereon. The materiality of this evidence should be obvious to any one (III-389, 440).

The Court refused to require the production of records which would show that each depositor had been required to pay the $35 per bond assessment (III-391-392).

Regarding the last two mentioned refusals, we submit that the beneficiaries of this trust were entitled to such documentary evidence as might prove a duality and conflict of interest on the part of the Trustees; and the Trustees were under a duty to prove by such documentary evidence that such duality of interest did not exist. Obviously if the 557 bonds which were run through the fictitious distribution account were owned by the Trustees, or the Trustees had not paid the $35 per bond assessment on their own bonds, the beneficiaries were entitled to know it. Thus, by the refusal of the District Court to enforce this duty of disclosure against the Trustees the facts showing the conflict of interest were not present. It is significant that this is the ground upon which the Circuit Court of Appeals held the case of *Woods* v. *City National Bank & Trust Co.*, *supra*, to be inapplicable. The duty enforced in that case was merely the fundamental duty always enforced by a court of equity and the fact that it arose under the Bankruptcy Act is wholly immaterial.

The Court refused to require production of the records showing the volume of securities owned by the purchasing Syndicate at the time of the sale thereof to itself on June 6, 1941 (III-449).

The Master refused to take any evidence as to the $22,400 balance in distribution accounts 1 and 2; and refused to require Defendants to furnish any information as

to what balances were left in the hands of the Committee at the time of the withdrawal of Plaintiffs' bonds (III-460-461), although the witness admitted there were moneys there that had not been expended (III-462). This $22,400 item is the one shown in Plaintiffs' Exhibit 21 (VII-1259) which has to this date never been accounted for and is presumably cash on hand with the Committee, and was in their hands during the time that Plaintiffs were depositors.

After adjourning the hearing for two and one-half days, in order to give Defendants time to produce certain correspondence, the Master then allowed them to produce whatever they desired to produce regardless of what had been demanded and what they had been subpoenaed to produce. In fact the witness admitted that none of the crucial correspondence from 1941 to 1945 had been sorted out and that he was just "too busy" to be bothered with complying with the Court's process and orders, although *subpoenae duces tecum* had been served a month before (III-485-488).

The Master refused to require the Defendants to produce all of their correspondence concerning the payment of any compensation or fees and ruled merely that "an attempt should be made to produce it, if possible." He likewise ruled such testimony would be screened by him before being submitted to Plaintiffs (III-543-544).

The Master denied the motion to require Defendants to produce all record evidence concerning the fixing of the $35 assessment (III-544); and the original records of the Depositary showing the distribution of moneys in distribution accounts 1 and 2 (III-545) upon the specific ground that the Master did not think the Plaintiffs were entitled to the names of the individuals who received the money and he did not want to take up the time to go into each one of the disbursements (III-546).

The Master refused to require production of the correspondence concerning the vital Lassiter suit upon the

ground that it would have no bearing upon the issues in this case, and he thought "Mr. Rorick has testified pretty thoroughly with reference to the Lassiter case. But I should like to have Mr. Rorick, *if he has time,* to check into the matter to see how much of a task it would be, if it could be done, to segregate the correspondence of the Committee with reference to the Lassiter suit" (III-551). We merely call the Court's attention to the vital matters contained in this correspondence, some of which was later produced showing the utter failure of the Committee to properly attend to this litigation and the machinations with reference to the fees charged.

Again the Master refused to require the production of the original records showing the distribution of moneys in distribution accounts 1 and 2, but he permitted monthly bank statements, as furnished to the Committee by its own Bank, to be taken as conclusive (III-552).

The consistent denial of disclosure and right of discovery is shown on pages 553 to 555, Volume III, of the record.

The Court denied the motion to produce correspondence with Watson concerning the fraudulent assignment agreements of April, 1935, and July, 1936, in the face of Rorick's testimony that he had never received Watson's opinion that these assignments were void (III-561), which testimony was directly contrary to the later evidence tendered, but refused in the form of Plaintiffs' Exhibit 78 (VII-1513), wherein Watson advised Rorick

> "not only recently but all along I have stated that I did not have confidence in the suit. I now state my reasons. I think the assignment is void * * *. I am so convinced of the invalidity of the assignment, however, that I shall not be able to argue to the Court that it is valid."

The Court refused to admit the agreement of March 11, 1935, between Rorick, representing the Jefferson Realty

Company and the District, which exempted the lands of the corporation from taxation within the District in connection with the agreement of less than one month later—April 4, 1935, constituting the void assignment of the District's funds, in consideration that the Committee re-pay certain thereof (including trust funds) back to the District (V-1219-1221). Rorick had previously owned the land involved and had sold it to the Jefferson Realty Company, owned by his relatives and associates, in 1913 (V-1224).

We call the Court's attention to the manner in which the correspondence that now appears as Plaintiffs' tendered Exhibits 26 to 93 (VII-1397 et seq.) was required to be screened by the Master before even allowing Plaintiffs to see it; and the manner in which the production was made of haphazard parts of files, obviously incomplete and with abstractions therefrom already made (IV-591-592).

The Master again denied the motion to require production of correspondence by or with the Committee, or any member thereof, which had to do with the fixing of the $35 fee (IV-595-596). The pertinency of this is shown in the correspondence we finally obtained disclosing the fraudulent misrepresentation that the fee would be three percent instead of three and one-half percent.

Again the Master refused to require production of correspondence in the Lassiter suit and could not see the materiality concerning fees because he was convinced that Roberts and Watson were honest lawyers (IV-670-671). The extreme pertinency of this is shown in view of the fact that we do not yet know what fees were paid on account of the Lassiter litigation because of the "deal" made with Neafie and the fees obtained from the Court by counsel representing Neafie.

The Master took bank statement sheets as primary evidence showing disbursal of funds and denied Plaintiffs'

motion to require production of the original evidence (IV-597-598) primarily because the names of the payees would be on the checks and we were not entitled to know to whom the money was paid (IV-599). We ask the Court to re-read the discussion had with the Master on pages 600 to 602 of Volume IV.

The Master, in requiring production of certain files to be screened by him, allowed one omission after another of vital letters and did nothing about it (IV-603).

Again the Master refused to require disclosure as to what has happened to the excess amounts in distribution accounts 1 and 2 (IV-648-649). Again he refused to require proof of ownership of the 557 bonds deposited with the Committee after the sale had been made (IV-723).

The attitude of the Master and Court below in regard to these matters is well illustrated on pages 1279 to 1291 of Volume V, which we ask the Court to review.

Again and again the Master refused to require the original records, but took the word of the witness testifying and that put an end to it (V-1293-1294).

The attitude of the Master is illustrated in permitting the statement of Rorick (III-552), and his final ruling as follows:

> "You (Mr. Rorick) might see if you can make some report, Mr. Rorick, about the condition of that correspondence, then we will rule upon the motion."

Again the Court required the screening of the correspondence before submitting it to the beneficiaries (V-1158), and again ruled upon its admissibility based upon its being privileged because it was with counsel for the Trustees (V-1162-1165). When certain of said correspondence was finally obtained and tendered in evidence, its admissibility was denied (V-1279).

Nothing could have been more erroneous than the denial of the right of discovery as to matters passing between the Committee and its counsel upon the ground that such are privileged. There is not and cannot be any basis of privilege existing between the trustee and attorneys employed by the trustee at the cost and expense of the trust estate as to any matters pertaining to that trust estate. We have been able to find no authority to the contrary, but on the other hand all cases, English and American, support the fundamental rule that the right of inspection is always relaxed where the person seeking the inspection has a special interest or an equal interest with the adverse party, as in the case of partners and persons between whom there exists a trust relationship; and that in the case of parties who stand in the relation of trustor and trustee, respectively, the Courts declare that the beneficiary or trustor has almost, as a matter of course, a right to a full and complete inspection of all books and records relating to the trust. *17 Amer. Jur.*, 1946 Supp., p. 7, Sec. 26.1. See likewise authorities assembled in Annotation *118 A. L. R. 272, et seq.* See complete statement of this rule in *Union Trust Co. of San Diego* v. *Superior Court*, 11 Cal. 2d 449, 81 Pac. 2d 150, 118 A. L. R. 259.

Nor is there any authority that we are able to find upholding the ridiculous theory that these beneficiaries were not entitled to original records because the same might disclose who their other beneficiaries were at the time. Citing Section 173 of the *Restatement, supra*, in support thereof, the recent case of *Brentmore Estate* v. *Hotel Barbizon*, 117 Misc. 11, 29 N. Y. S. 2d 830, held specifically that the holder of a voting trust certificate is entitled to obtain a list of the other voting trust certificate holders from the trustee. The fact that the list of holders might be incidentally disclosed is no basis in the world for the denial of ac-

cess to the primary and best evidence of the fact sought to be established.

It is therefore submitted that the record is conclusive that the Courts below have failed to hold the Trustees to the standard of conduct required, and have denied Petitioners their rights of discovery and disclosure.

Question No. 2: When the following facts were conclusively made to appear:

(a) THAT RESPONDENT TRUSTEES HAD NEVER RENDERED AN ACCOUNT TO ANY ONE AND HAD NO INTENTION OF ACCOUNTING TO ANY OF THE BENEFICIARIES OF THE TRUST; AND

(b) THAT FOUR YEARS AFTER THE ACCOMPLISHMENT OF THE PURPOSES OF THE TRUST, THERE REMAINED IN THE HANDS OF THE TRUSTEES, UNACCOUNTED FOR, ASSETS AND FUNDS THAT WOULD NEVER BE ACCOUNTED FOR AND DISBURSED TO THE BENEFICIARIES, UNLESS ORDERED BY THE COURT; AND

(c) THAT NO AUDIT OF ANY CHARACTER HAD EVER BEEN MADE OF THE TRUST; AND

(d) THAT NO BOOKS OR RECORDS WHATSOEVER WERE KEPT OF RECEIPTS, DISBURSEMENTS, OR THE APPLICATION OF THE PROCEEDS OF COLLECTIONS IN THE FORM OF A LEDGER, CASH BOOK, JOURNAL, JUDGMENT LEDGER, OR OTHERWISE, ALTHOUGH THE TRUST HAD HANDLED APPROXIMATELY $5,000,000; AND

(e) THAT THERE WAS NOT ONLY CONSTRUCTIVE, BUT ACTUAL FRAUD UPON THE BENEFICIARIES; AND

(f) THAT THERE HAD BEEN A COMPLETE BUNGLING OF THE AFFAIRS OF THE TRUST RESULTING IN NOTHING OF VALUE BEING ACCOMPLISHED FOR THE BENEFICIARIES,

WAS IT NOT THE DUTY OF THE COURT, ON ITS OWN MOTION, OR OTHERWISE, TO AWARD THE FOLLOWING RELIEF:

1. DENY ANY COMPENSATION TO THE TRUSTEES;

2. REDUCE THE EXORBITANT FEES ALLOWED THE DEPOSITARY, SECRETARY-TREASURER, AND ATTORNEYS FOR THE TRUSTEES;

3. APPOINT A SUCCESSOR TRUSTEE WITH ORDERS TO MAKE A THOROUGH AUDIT AND DETAILED ACCOUNTING, AND REPORT THE SAME TO THE COURT;

4. RESTORE TO ALL BENEFICIARIES THEIR RIGHTS IN THE TRUST AS DISCLOSED BY THE FINAL AUDIT AND ACCOUNTING.

In summary, Petitioners contend the Trustees were entitled to no compensation, the fees allowed should have been reduced, a successor trustee should have been appointed, to be followed by a complete audit and detailed accounting so as to restore to beneficiaries their rights in the trust.

It is submitted that the facts stated in this question have been made to clearly appear. Many of them are treated with record references in the Statement of Facts hereinabove contained. However, we re-emphasize the same as follows:

(a) It must be admitted that the Defendant Trustees had never accounted to any one, either by virtue of their duty as Trustees, or by virtue of the positive provisions of the Trust Agreement—and it is likewise obvious that they had no intention of ever accounting to their beneficiaries. The Chairman admitted that the final accounting "required by the Deposit Agreement upon the termination and winding up of the affairs of the Committee, has not been filed; and it cannot be filed until these different claims against the Committee, including this suit by the present Plaintiffs, are disposed of" (II-138).

Again the Chairman stated that the Committee could not file its final account under the Deposit Agreement so long as the present suit was threatened (III-437). Thus it is that no accounting whatsoever had been made at the time of the hearings in the Court below, and as far as counsel is informed no such accounting has yet been made, and from the attitude of these Trustees we may rest assured that it never will be done. The only relief which the Plain-

tiffs and other beneficiaries may hope to obtain is in this Court ordering that a proper, full and complete accounting be made. This attitude of the Trustees is disclosed in the statement of the Chairman that he did not have time to go through the records of the Depositary and that his time was being wasted (III-444).

Again it was admitted that there had never been an accounting pursuant to the provisions of the Committee Agreement (VII-1028, 1036).

There never was any showing as to the amount of money received by the Committee on charges collected directly from bondholders on transferring certificates (III-386).

There never was any accounting by the Committee as to the exact amount of debt service moneys remitted back to the District, although it was admitted that the disbursements to the District included these trust funds (III-328). The Treasurer himself was unable to testify as to the exact amount of moneys received from the District as he had no record thereof (III-329).

No member of the Committee had ever figured up the total face value of all securities sold (III-335).

The Chairman admitted that he had never rendered an itemized statement of his expenses (IV-642-643).

It was further admitted that the cost to bondholders and the percentage or pro-rata portion per bond had never been computed, nor had there ever been a computation of the expenses and compensation which had been deducted from collections made prior to the sale (V-1212-1213).

(b) It was conclusively proved that although four years had elapsed after the accomplishments of the purposes of the trust, there remained in the hands of the Trustees, unaccounted for to any body, assets and funds that would never be accounted for and disbursed to the beneficiaries unless ordered by the Court.

Plaintiffs' Exhibit 18 (VII-1252, 1254) shows that there is cash on hand as a result of Plaintiffs' audit of Defendants' own exhibits, and admissions in their own testimony, of $75,361.29; and that Defendants admittedly parted with $61,071.05 (how much more we do not know) of debt service trust funds collected by them and which should have been immediately disbursed to the beneficiaries. These are the debt service moneys sent back to the District for administration purposes. This makes a total of $136,432.34 which admittedly should be accounted for. Without a thorough audit, no one will ever know how much more is still on hand.

Clearly Plaintiffs have a right in and to these balances because every dime of this money was collected while they were admittedly depositors and members of the trust.

(c) That no audit of any character had ever been made of the trust is conclusively admitted by the Secretary-Treasurer of the Committee as follows:

> "Q. Mr. Rorick, as Treasurer of the Committee, were your books or records or whatever documents you had ever audited by any body?
> "A. No sir.
> "Q. Have they ever been audited by any body?
> "A. No, sir." (III-343)

Of course, if an audit had been made unquestionably the Trustees would have produced it. We cannot conceive of banking officials acting as Trustees, and who handled total receipts of $5,203,979.60 (VII-1252), who never had an audit of the affairs of the trust.

The Court's attention is called to the motion made by Plaintiffs to require the submission of some kind of consolidated balance sheet from which a start could be made (II-66); which motion was denied (II-69).

In addition, Plaintiffs tendered the cost for proper audits to be made, and this request was denied.

(d) The record is conclusive that no books or records whatsoever were kept of either receipts or disbursements, or of the application of the proceeds of collections by way of a ledger, cash book, journal, judgment ledger, or otherwise, although the trust handled something in excess of $5,000,000. Such facts are disclosed by the following: The Chairman admitted that "the Committee does not keep what you call a set of books" and that it did not set up a judgment ledger on the judgments obtained (III-267). In fact the Chairman had to look at the decree in the Lassiter suit to ascertain and testify as to the amount collected by the Committee, and relied upon that decree as having been taken from the books of the debtor District (III-267).

The only book of any character maintained was the minute book, according to the testimony of the Secretary of the Committee (III-315). No record of the bonds or coupons deposited with the Committee were kept as required by Section 4 of Article VI of the Committee Agreement (111-315). Positive testimony of the Secretary-Treasurer of the Committee was that he kept no books whatsoever with reference to the receipts and disbursements (III-319), and the only records he had were the checks and deposit slips and stubs and correspondence (III-319), nor was such record maintained by the Treasurer of the Committee as an officer of the Depositary (III-319).

No record was kept by way of a judgment ledger (III-320), nor of the application of moneys to the liquidation of any judgments, except reports from the District, but no bookkeeping record of these transactions was maintained at any time; and the only record as to bonds on deposit was a set of cards listing the holders and maintained by the Depositary (III-320).

The Secretary-Treasurer of the Committee testified that Defendants' Exhibit 24 was made up from bank state-

ments, letters the Committee had received enclosing remittances, and deposit slips, and that no other records or set of books was at any time ever maintained by the Committee (III-325).

The Secretary-Treasurer of the Committee testified he did not maintain a file with reference to judgments obtained; that he had never figured the total face value of the bonds, coupons and interest as sold to the Syndicate on June 6, 1941, and that to his knowledge no member of the Committee had ever computed it (III-335). Again it is admitted that the Committee had no record showing the application of moneys paid upon judgments obtained (V-1291-1292).

In the face of the foregoing, every presumption whatsoever should have been indulged in against the accuracy of the oral secondary evidence given, and nothing short of a thorough going audit should have been sufficient to exonerate the Trustees.

(e) It is submitted that the record proves conclusively, not only constructive but actual fraud committed against the beneficiaries of this trust:

The failure to disclose, not only moneys on hand, but the amount of compensation and expenses, and account to the beneficiaries in detail and accurate form raises a presumption of fraud.

There was positive fraud shown in fixing the withdrawal charge. The uncontradicted evidence of the Chairman of the Committee himself is as follows:

> "As a practical matter, the Committee followed in this case the same policy as other Committees in which I had been interested; and which, so far as I know is the policy of practically all the deposit agreements in Florida, fixing an amount to be charged per bond to the depositing bondholders as their pro-rata share of the expenses and liabilities of the Committee; and after

> once fixing this amount, which constituted a limited fund, the Committee, their attorneys, depositaries, Secretary and other employees, had to come within that limit in the apportionment of the charge per bond which had been fixed and determined" (III-270).

The Chairman again reiterated this method as being an assessment per bond "and then out of that they paid all of their expenses and their employees" (III-491).

It is submitted there was fraud in maliciously withholding delivery of Plaintiffs' securities for a period of two years and eleven months under the circumstances, as above detailed in the Statement of Facts.

There was fraud in the misrepresentation by the Chairman to the Co-Trustee, Grundy, to the Committee's attorneys and to the purchasing Syndicate that the assessment charge would be $30 per bond instead of $35.

There was fraud in parting with debt service moneys collected and applicable solely to the payment of the judgments obtained by remitting them back to the District for administrative purposes. That a minimum of $61,071.05 was so handled is admitted (VII-1254). This was not only contrary to the express trust agreement, but contrary to the very law established by the Committee's own general equity suit, which held that the acreage taxes had been pledged solely to support the bonds and could not be used for administrative or other purposes of the District.

In this connection it was admitted that this money had been remitted to the District, but the Committee had kept no record showing the amount (III-328). The Treasurer had no record of the moneys received from the District and took the word of the Treasurer of the District as to the amount that had been paid (III-329, 330).

There was fraud in the manner in which distribution accounts 1 and 2 were handled by depositing money in those

accounts to be paid to bondholders who would thereafter deposit their bonds as "bait" to get them to so deposit them instead of promptly remitting the money to the then depositors; and this fraud was made even more reprehensible by the Committee borrowing money from its own Bank and paying interest thereon while there were unexpended balances in these fictitious accounts. This fraud was further enhanced by the Committee even paying out some of this money on the 557 bonds which were deposited after the sale to the Syndicate. These facts are detailed with record references in the above Statement of Facts, and we are confident cannot be denied.

There was fraud in not disclosing, even to the Court, when Defendants' Exhibit 24 (VI-595) was filed on July 1, 1944, that there was an additional item of receipts in the sum of $29,269 that had not been included therein, and the Secretary-Treasurer of the Committee (when quite by accident this item was discovered because referred to in another document (III-279) was forced to admit that Exhibit 24, though purporting to be a complete list of disbursements, did not contain this item (III-326). The manipulation of this account, as disclosed by Defendants' Exhibit 53 in attempting to explain, is apparent and again shows the manner in which these Trustees conducted the affairs of the Trust.

There was fraud in not disclosing in any manner, either in reports to bondholders (Defendants' Exhibits 22—VI-552), or in the receipts and disbursements filed July 1, 1944, the receipt by the Committee of the sum of $26,650.90 on the sale of $72,480 in excess coupons on deposit with the Committee, and the only manner in which this was discovered was when the Plaintiffs required production of and introduced in evidence as their Exhibit 2 (VII-868) the contract between the Committee and the Syndicate, there

was a pencil notation in Mr. Rorick's handwriting as follows: "72,480 coupons delivered and paid for today" (III-450). To this moment the proceeds of the sale of those coupons has never been accounted for to the Court or any one else. (III-450, 451, 453, 454).

There was fraud in Plaintiffs' Exhibit 24, supra, in representing to the Court as liabilities existing matters that the Committee well knew did not constitute liabilities. For instance, until the minutes were wrung from the Committee it was not disclosed that Senator Grundy had refused under any circumstances to take any compensation for his services (III-363-364). Other "liabilities", as set forth in this purported accounting, are shown not to have been paid at the time of the hearing although many years had elapsed —and all this money is still in the hands of the Committee.

The manner in which the Committee fraudulently withheld information and failed to account to their beneficiaries is disclosed by the admission of Rorick that his so-called report of August 24, 1942 (Defendants' Exhibit 22—VI-552), did not show the sale of the 557 bonds taken in by the Committee after June 6th and the payment of $20 per bond thereon from the distribution accounts, and the receipt by the Committee of 52 cents per bond more for those bonds than the others that had theretofore been sold. He explains and attempts to justify this obscure report upon the ground that he advised the holders that the figures are only "approximate" figures, and admits that all of the figures in that report are merely an approximate summary (III-520). He likewise admits that this statement shows nothing about the proceeds from the sale of the $72,480 in coupons (III-520). This he considered a minor matter, and was unable to testify how many of these coupons were from the 557 bonds, admitted that no separate account was set up as to the $26,650.90 received from the sale of these coupons,

but as far as he knows, although he is not sure, the Committee carried that sum through the other accounts in connection with the sale of the bonds (III-521).

This is further corroborated by additional testimony (IV-726).

Another constructive fraud on beneficiaries, in addition to the alleged liability that did not exist to Grundy, is shown in the fact that instead of Caldwell being paid the alleged balance of $10,000, he was actually paid $6,460.68; Roberts was paid $65,000 instead of $75,000 and Watson was paid $35,000 instead of $40,000 (II-186; VII-1252). When the Chairman of the Committee was asked why these alleged liabilities had not been paid in full after so many years, he replied "that is none of your business as I can see" (II-191).

(f) That there had been a complete bungling of the affairs of the trust resulting in nothing of value being accomplished for the beneficiaries, we submit, is apparent from the Statement of Facts. We supplement the facts as follows:

There was absolutely nothing accomplished with the exception of the collection of $20. per bond over a period of ten and one-half years.

The sale to the Syndicate at a figure approximating 33⅓ cents on the dollar of the gross collectible claim against the District was in no sense a reorganization or settlement of the debt problem, but was merely an over the counter sale. Rorick himself admitted this when he said:

> "All that our Committee did in the negotiations with Governor Holland as the specially appointed all-powerful agent of the Everglades Board was to sell all of our bonds and coupons to a Syndicate selected by him. We had nothing whatsoever to do with the R. F. C. We had nothing further to do with the District except to make this sale which is set out here" (V-1234).

That this sale was made for tactical reasons based upon the poor judgment of the Chairman that the money could not be raised, and he thereby found himself enmeshed in agreements with the Governor and Syndicate to sell, is borne out by Defendants' Exhibit 19 (VI-515, 529), being the communication to the bondholders of April 24, 1941, requesting authority to sell, and the bondholders were specifically advised as follows:

> "Your Committee have recently been requested to make an offer to sell our bonds at 50 and interest thereon from January 1, 1938, at 4%, separate and apart from the refunding agreement contained in the above Memorandum of March 7, 1941. We have also been told that the Board believes that they have parties who are willing to purchase our bonds at the above price and step in our shoes and then accept new refunding bonds based upon the proposed reappraisal of benefits and a new tax structure based thereon. While your Committee believe that the Board can find purchasers of the new refunding bonds at the above price, or even better, if issued under the terms and provisions of the above Memorandum of March 7, 1941, based on Chapter 10026, Acts of 1925, with the levy made thereunder greatly reduced, yet your Committee do not believe that purchasers can be obtained at the above price, of new refunding bonds based on the proposed new Act providing for reappraisal of benefits, re-zoning and a new tax structure based thereon. However, we believe that the only way to convince the State officials and Everglades Board and landowners that this cannot be done is to give them the opportunity to try it out, and your Committee have, therefore, recommended in the first two paragraphs of this letter, that you give your Committee the necessary authority to sell at the above price."

Thus it was that the Committee obtained the authority from some of the bondholders to sell, based upon their assurance that purchasers could not be found at the price.

The only basis for there being a Syndicate in the picture was given by the witness Wallis, who said "that neither the Committee nor the R. F. C. chose to have dealings with each other" (V-768).

Another witness stated that the only thing the Committee could do was to sell because they had no plan to offer the bondholders for refunding, and this same witness admits that in his thirty years' experience where bonds were on deposit with a Protective Committee he had never known them to be sold over the counter to an independent agency, who in turn refunded them and took the refunding bonds by which operation the benefit of the refunding inured to the purchaser rather than to the depositing bondholders (V-1118).

In fact the Chairman admitted he had serious doubts that the Syndicate would be able to raise the money and that he really made the offer to convince the District that it would have to refund and give long term refunding bonds, and further admitted that a majority of those who had purchased the original bonds as investors would rather have accepted such refunding bonds (VI-621). The only reason the Chairman knew for the Syndicate "was the stubbornness and antagonism toward the bondholders" (IV-623). He admitted he never attempted to get competitive bids and did not consider his letter of May 19, 1941 as a commitment to sell (IV-624, 625). See Plaintiffs' Exhibit 12 (VII-1172).

That this was definitely an over-the-counter sale and nothing else is further testified to (V-1135, 1150).

A further instance of the manner in which the affairs of the Committee were bungled was the arbitrary and consistent refusal to re-zone the District and have a re-appraisal on the basis of present benefits rather than benefits as contemplated by the original Act when the bonds were issued. The Chairman admitted his refusal to consider such action

(V-1267), yet this is just what was done by the 1941 Act, under which the refunding was had (V-1332-1333). Apparently the Chairman had talked about it for a number of years, but nothing was done (VII-1438-1439).

It was admitted that the Committee never did conduct a survey because "it had more important work to do" (V-1268). The reason given by the Chairman was "we never doubted the ability of the District to pay. What we doubted was our ability to make them pay" (IV-722).

Another instance of the utter failure of these Trustees to properly represent their beneficiaries is shown by the fact that in making the sale the Committee was wholly ignorant of the cash position of the District and the money on hand (III-481), although it is admitted that there was $112,000 which was paid to the Syndicate, and that there was a total of approximately $512,000 which included $400,000 for the purpose of meeting expenses incurred in connection with the refinancing and certain other debts of the District—all of which was cash on hand at the time of the sale (V-1231). No effort was made to ascertain these facts and the Chairman admitted that even if he had known the cash position it would not have influenced him one bit.

Another fundamental defect in the Committee's operation was its failure to make a constructive study and analysis and set up and propose a definitive refunding plan or make a definite proposal that could be agreed upon (V-1029, 1039).

Finally, the Chairman admitted that the Syndicate was made necessary because the Board had refused to deal with the Committee (III-483).

The failure of the Committee to obtain proper information is further disclosed by the fact that it had never even tried to obtain the biennial reports of the District subsequent to 1927-1928, and no member of the Committee had

ever seen any subsequent reports or the survey made by the R. F. C. of the District in 1940-1941 (IV-720-722).

Furthermore, the sale to the Syndicate was made wholly without reference to the intrinsic value of the securities because both Rorick and Easton admitted that there was never any doubt in their minds as to the ability of the District to pay—but it was merely an unwillingness (III-527; V-1345; IV-734-736).

There could probably be no better admission of the futility of the efforts of the Committee to enforce the rights of its depositors than the foregoing testimony to the effect that there was never any doubt as to the intrinsic worth and ability to pay.

Another instance of utter dereliction of duty is shown by the fact that the Committee did not post a bond to make effective its injunction in the general equity suit (IV-610); that the tax sale of 1932 under the unconstitutional 1931 Act was not interfered with by injunctive process (IV-610, 611); and that no levy of taxes was made thereafter until 1935, and 1936, both by agreement with the District (IV-611, 612). The failure to get effective injunctive relief resulted in the District expending more than $120,000 of debt service moneys between May 19, 1931, and April 13, 1932, that should have inured to the benefit of the depositing bondholders, and the only explanation the Chairman gave was that the Committee had done "the best we could" (V-1263).

Another dereliction was the absolute failure to purchase any tax certificates at such tax sales as were held, although the Chairman admits that should have been done. He attempts to explain it on the basis of no money available although there were moneys available, either by way of loans or after the collections started in 1935 (IV-616-617). The Chairman admits again that it would have been sound business judgment for the Committee to purchase tax certificates (IV-685), and admits that tax sales were held in 1936

and 1937, but that the Committee never bothered to attend a tax sale (IV-681-683).

The prior minutes and correspondence show conclusively that the Committee considered buying these tax certificates, arrangements were made and funds available (V-1269-1270), but they failed to fulfill their duty in this regard (IV-680).

There was never any doubt in the Chairman's mind that the District could have financed a refunding issue, par for par, with a cancellation of a substantial portion of the accumulated interest, and that the District was well able to pay the debt (V-1345). This is another conclusive admission of failure to accomplish that which was for the best interest of the depositors; particularly is this true—when not only did the Chairman's bond house float all of the original issues, but as he testified, the vast majority of the depositors with the Committee were those who had originally paid par or better for their securities (III-529-530).

Again an admission of failure was made by the Chairman when he admitted that it would have been far better for the bondholders to get a par for par exchange for new refunding bonds than to sell, that the Committee had tried to do this but had failed (IV-734-735).

Apparently no real effort was made to get any information as to the cash position of the District (IV-736), and the Chairman never bothered to get the accounting that was rendered by the District in the Lassiter suit (III-472). Another admission of failure is made in the words of the Chairman as follows: "From a practical standpoint in the amount of collections, we did not accomplish much, as I remember it" (V-1198).

As early as 1937 the Chairman wrote to Watson (VII-1475) advising "the results obtained up to date for our depositors have been very disappointing to them and also to

> the bringing of such suit, if possible, before the withdrawing depositors receive their securities, and thereby secure judicial determination of the rights of depositors and the rights and liabilities of the Committee under the Deposit Agreement. We want to avoid the disbursement of all funds and then be sued for an accounting."

This attitude was undoubtedly the reason why, as a condition precedent to payment, the Chairman demanded that counsel for the Committee sign the outrageous agreement represented by Plaintiffs' Exhibit 89 (VII-1544). We do not yet know whether Watson signed it; Fraser did, but Roberts refused.

Another admission of failure is in the letter from Rorick to Caldwell of October 25, 1941 (VII-1549), wherein he states that "quite a good many of our depositors, who are the real clients in this matter, of all of us, naturally feel dissatisfied with the results obtained for them." He advises that this is one of the most important points to be considered in determining compensation and calls Caldwell's attention to the last letter to the depositors dated June 7, 1941, in which it was stated:

> "We regret that we have been unable to secure long time refunding bonds for you in exchange, par for par, for your present bonds, but we have done the best we could."

This failure of the Committee is made even more inexcusable when it is realized that the actual validity of the bonds or the constitutionality of the statute under which they were issued had never been questioned after the formation of the Committee, but had long prior thereto been placed finally at rest. Rorick admits this in his letter to Watson (VII-1478) when he says that since the Lainhart and Ban-

nerman decisions (long prior to 1925) "the purchasers of the bonds have regarded any question as to their constitutionality being *res judicata.*"

This failure is further accentuated by the testimony showing the refunding operations in other units in Florida at an average cost to bondholders of two percent, all of which were on a par for par principal exchange with merely reduced interest rates (VII-1255, 1256). This charge should be compared with the cost to bondholders depositing with this Committee of $63.11 per bond (VII-1258).

The tremendous improvement in the District and its condition at the time of this sale on June 6, 1941, further shows the utter failure of the Committee to obtain for its depositors that to which they were entitled. The application from the District to the R. F. C. dated July 25, 1938 (VII-1271), requesting an additional loan shows the tremendous improvement in the District, and it must be remembered that Rorick had marketed these bonds to the public prior to 1925 on a par basis and the improvement took place since that time—and yet he obtained for those same bondholders only 33 1/3 percent of their claim.

The prospectus of B. J. Van Ingen & Company, appearing as Exhibit 4 to the Wallis deposition (VII-1565) should be read by the Court to show the amazing recovery of this District and it is proof conclusive that it constitutes the outstanding tax responsibility in the State of Florida.

Of the 4,500,000 acres of land in the District, embracing eleven Counties in the State, there are only 868,000 Government owned or State owned, the balance owned by private individuals as to which the tax liability and ability to pay were unquestioned. Time and time again Rorick admitted, and Easton concurred, that there was never any doubt as to the intrinsic value of the bonds, but it was merely an unwillingness to pay—this again being an admission of

the futility of their efforts to enforce the tax liability (IV-713-717).

At the time of the refunding following the sale, the District put up a $500,000 reserve fund, and in addition there has been over half a million dollars in bonds retired from funds on hand (IV-749). This is all in addition to the moneys expended for the expense of the refunding operation.

Rorick admitted that after 1933 economic conditions in the Everglades had improved to such extent that the land owners could have paid their taxes if they had been willing to do it (V-1302).

Even the 1941 Act, under which the refunding bonds were issued, provided for a $600,000 annual levy which would have easily supported a par for par principal exchange of the approximately $9,500,000 bonds outstanding at an initial two percent rate; funds of the District between June, 1941, and 1944 in the amount of $800,000 retired that much principal of the debt, together with $500,000 as a debt service reserve account—all by December, 1944 (V-966, 967). In addition to the above, there was $320,000 cash on hand, and as of October 31, 1944, there was $331,590, plus $185,000 in debt service funds and in the suspense account (V-967). If ever the rights of bondholders were literally thrown away, it was in this situation.

We ask the Court to review the reports to bondholders, beginning with Defendants' Exhibit 17 (VI-482), all of which show the ability of this District to refund on a par for par principal exchange basis, and call attention to "the tremendous increase in wealth and value in the Everglades District" and to the fact that the Committee has "no doubt whatever as to the ability of the District to provide $400,000 without undue hardship"—this latter as late as January 15, 1941 (VI-514).

In the light of the above facts, it is respectfully submitted that the following authorities support the contentions of Plaintiffs that Defendant-Trustees should have been denied any compensation and the exorbitant fees allowed the Depositary, Secretary-Treasurer and attorneys should have been drastically reduced.

We also contend that a successor Trustee should have been appointed under order of the Court to make a thorough audit and detailed accounting and report the same to the Court, following which all beneficiaries should have been restored to their rights in the remaining trust assets as augmented by such surcharges as should be ordered on the basis of equity and good conscience.

Equitable remedies of the beneficiary of a trust are set forth in *American Law Institute,* Restatement, Trusts, Volume 1, Section 199, as follows:

> "The beneficiary of a trust can maintain a suit
> "(a) to compel the trustee to perform his duties as trustee;
> "(b) to enjoin the trustee from committing a breach of trust;
> "(c) to compel the trustee to redress a breach of trust;
> "(d) to appoint a receiver to take possession of the trust property and administer the trust;
> "(e) to remove the trustee."

That the powers of a court of equity in connection with a trust should be exercised regardless of the technical issues or the parties before it are all well settled, and the Court has power and is under the duty to fix the compensation of the trustee, to surcharge his accounts and to restore to the trust estate improper amounts expended, to require a complete audit of his account, and to settle it. Should the audit disclose provable ground for the removal of the

trustee and the appointment of another in his place, the Court may, by proper order, so do. *54 Amer. Jur., p. 405,* Sec. 510.

Other beneficiaries are not necessarily parties and the trustee waives the option where he does not urge it in the trial court. *54 Amer. Jur. 404,* Sec. 508.

It is well settled that on application of any party in interest a trustee may be cited to exhibit or render an accounting, and upon the Court being apprised of the continued failure of a trustee to render any account it should, upon its own motion, immediately cite him to render such account. *54 Amer. Jur., p. 403,* Sec. 506.

Leonard's Will, 202 Wis. 117, 230 N. W. 715, 83 A. L. R. 712.

In all actions of accounting by a trustee the burden is on him to establish items of discharge by proper proof, and in cases of obscure accounting every intendment is indulged against him. *54 Amer. Jur., p. 405,* Sec. 509.

In the case of a false and fraudulent account, the same constitutes fraud practiced upon the Court and should be dealt with accordingly. *54 Amer. Jur., p. 406,* Sec. 511.

Nothing is better settled than that the practice of allowing to trustees large and extravagant counsel fees payable out of trust funds under the control of the Court should be disapproved. *54 Amer. Jur., p. 415,* Sec. 523.

And the Court, in its discretion, may ordinarily increase, diminish or deny compensation to a trustee. And where the compensation is chargeable against and payable out of the estate, as is usually the case, it comes into the accounting and before the Court whenever the accounting is brought before the Court. *54 Amer. Jur., p. 417,* Sec. 527.

In the case of an obscure accounting and explaining by a trustee of transactions in the administration of the trust the compensation of the trustee in respect of such transac-

tions should at the most be at a minimum. *54 Amer. Jur., p. 424,* Sec. 540.

And under the general rule that all intendments are against a trustee who fails in his duty to keep adequate accounts, compensation of a trustee should be put at the lowest estimate in respect of obscure disclosure of services and transactions. *54 Amer. Jur., p. 425,* Sec. 540. And a failure to keep records or accounts should under some circumstances result in denial of any compensation to a trustee. *54 Amer. Jur., p. 425,* Sec. 540. *Walker* v. *Walker* (*Walker* v. *Beal*), 9 Wall. 743, 19 L. Ed. 814.

The *Annotation in 110 A. L. R. 566* on the question of the compensation of a trustee, as affected by neglect or violation of his duties, shows the unquestioned rule to be that as stated in American Law Institute, *Restatement of the Law of Trusts,* Volume 1, Section 243; if the trustee commits a breach of trust the Court may in its discretion deny him all compensation or allow him a reduced compensation, or allow him full compensation; but that if he negligently mismanages the trust or misappropriates the trust property he will ordinarily be allowed no compensation. The cases are legion as reviewed in this Annotation that the failure of a trustee to keep accurate accounts and records, and render a complete accounting to his beneficiary deprives him of compensation, and that selling trust property without the consent of the beneficiary is such constructive fraud as will disentitle the trustee to any commission. Concealment by the trustee of moneys received justifies a forfeiture of compensation. We shall not burden the Court with specific citations that have established these well known rules of equity.

From an early date the Supreme Court of the United States has consistently applied these equitable principles. Thus it has been held that where a trust relation exists the

cestui que trust is entitled to a complete accounting from the trustee, in which all data in the trustee's account (which it is his duty to keep) should be furnished. *Dillman* v. *Hastings,* 144 U. S. 136, 12 S. Ct., 662, 36 L. Ed. 378.

Likewise, the Court has held that a trustee who has acted dishonestly or fraudulently, kept no books of account, and made no accounting of their trust and risked the funds thereof, has but small claim to compensation in any shape or to any amount. *Barney* v. *Saunders,* 16 How. 535, 14 L. Ed. 1047.

See *Woods* v. *City National Bank & Trust Company of Chicago, supra,* for a most recent statement of the rules as to strict liability and performance of the duties of a trustee.

We call the Court's attention to the case of *Weil* v. *Neary,* 278 U. S. 160, 49 S. Ct. 144, 73 L. Ed. 243, which held as contrary to public policy and void an agreement between attorneys for a division of fees in a bankruptcy proceeding. One of the attorneys was counsel for the trustee, the other was counsel for creditors. We submit that the same identical theory applies to the manner in which the limited fund was obtained in this case by an arbitrary assessment against bondholders that produced so much money and then by agreement and negotiations between the trustees and their attorneys, Rorick "cut the loaf" as between him, his Co-Trustee, the counsel and employees of the Committee.

It is therefore submitted that there was error in denying the full and complete accounting to which Plaintiffs were entitled; and in allowing the compensation to the Trustees and others to stand, and in failure of the Court below to bring about a final and complete audit and accounting of the administration of this trust.

Question No. 3: Were not Petitioners entitled to damages to be measured by the legal rate of interest on the value of their securities from the time when respondent trustees unlawfully converted them by an unauthorized sale until the date when such securities were returned to Petitioners, as well as exemplary damages?

In summary, it is contended that the Trustees were liable in damages, both compensatory and exemplary in the light of their conduct in wrongfully converting and detaining Petitioners' securities.

From the foregoing recitation of facts, it must be admitted as follows:

That on June 6, 1941, the Plaintiffs' securities were wrongfully converted by the Trustees when, without a semblance of authority, they unconditionally sold and delivered them to a purchasing Syndicate.

That there was a malicious refusal to redeliver them even after the Trustees had obtained them back from the R. F. C., to whom the Syndicate had passed title, unless the Plaintiffs would sign a full and complete release and thereby exonerate the Trustees from any duty to account (VII-1290).

That the refusal to deliver was based upon the knowledge that if the bonds were placed upon the market Plaintiffs would obtain more than any non-withdrawing depositors had obtained and thus embarrass the Committee.

That it became necessary, after repeated demands, to institute this suit and as a result thereof Defendants were ordered to deliver the securities within thirty days after the order of the Court dated April 28, 1944 (I-117).

That delivery was not made until May 31, 1944, three days after the time fixed in the order had expired, and only following service upon counsel for Defendants of a motion to have the Defendants adjudged in contempt of court for

failure to comply with the order of April 28, 1944 (VII-1291).

That prior to their return, and on May 3, 1944, Defendants entered into a contract and sold, and after the return of the securities, delivered their 219 bonds for a price of $199,650.42 (VII-1291). This price is the only sale in evidence except the sale of all the securities to the Syndicate—and the price obtained from the Syndicate cannot be considered evidence of value because that is one of the matters that caused Plaintiffs to withdraw and they proved they were right by obtaining a higher figure.

Thus Plaintiffs contend they are entitled to compensatory damages measured by interest at the legal rate (six percent in Ohio) from June 6, 1941, until May 31, 1944, being two years eleven months and twenty-five days upon the only value of the property fixed by evidence of a sale thereof during that time, to-wit, $199,650.42.

They likewise contend they are entitled to exemplary or punitive damages in the face of the malicious refusal of these Trustees to return their property to them.

As to compensatory damages, there should be no argument as to the well settled rule that when personal property is converted the measure of damages is the value of the property at the time and place of conversion, plus legal interest thereon to the date of the verdict. By obtaining possession of the property and re-delivering it to the Plaintiffs, these Defendants merely mitigated the damages to the extent of the value of the property—they in no manner excused themselves from paying interest.

Nor are we concerned with the question of whether the damages are to be measured by the value at the time and place of conversion, or the time and place of return, or the time and place of the institution of the suit or the judgment therein, or the highest intermediate value, or highest value within a reasonable time thereafter. This is true because

the only evidence in the record of a sale of these particular securities fixes the value at $199,650.42.

That interest is allowed under the law of Ohio on the value of property wrongfully converted is held in *Cincinnati Finance Company* v. *Booth,* 111 Ohio St. 361, 145 N. E. 543, where a judgment for the value of stock and interest thereon from the date of conversion was affirmed.

In fact the only jurisdiction that does not follow the rule as to interest being proper is Oregon, and the actual rule there is somewhat in doubt. There is a full and complete collection of the cases involved in *96 A. L. R. 74, et seq.,* as supplemented in *111 A. L. R. 1302, et seq.*—and later cases have even removed any doubt as to the rule in Oregon, and it may therefore be stated as the unanimous rule that the measure of damages for the wrongful conversion of personal property is the value of the property at the time and place of conversion, with interest on that value from that time.

The question then arises as to whether there is any deviation from the rule by the Defendants having, under order of court, and subsequent to the filing of this suit, delivered the securities to the Plaintiffs. That there is not has been conclusively decided by the Supreme Court of the United States in *Buffum* v. *Peter Barceloux Co.,* 289 U. S. 227, 53 S. Ct., 539, 77 L. Ed. 1140, wherein speaking through Mr. Justice Cardozo, the Court said:

> "The defendant being chargeable with the value upon the filing of the bill, the question for us now is whether it could change its liability by buying back the shares. The answer is supplied by the opinion of Story, J., in *Oliver* v. *Piatt,* 3 How. 333, 401, 11 L. Ed. 622, 652, a land mark in the law of trusts. The trustee who misapplies the subject matter of a trust becomes accountable at once for the proceeds or the value * * *. Nothing that he can do afterwards in buying the property back will affect that liability, except at the option

of the beneficiary complaining of the wrong. 'This right or option of the *cestui que trust* is one which positively and exclusively belongs to him, and it is not in the power of the trustee to deprive him of it by any repurchase of the trust property, although in the latter case the *cestui que trust,* may, if he pleases, avail himself of his own right, and take back and hold the property upon the original trust; but he is not compellable so to do' (citing numerous cases). Any other rule, it was said, would enable the wrong doer to take advantage of his own wrong; to let the transaction stand, if the investment showed a profit, and by aid of a repurchase to charge the beneficiary with an intermediate decline. Cf. *Barney* v. *Saunders,* 16 How. 535, 543, 14 L. Ed. 1047, 1051. The standard of duty is no different whether the trust to be enforced is actual or constructive (citing cases). The implication of a trust is the implication of every duty proper to a trust. Equity has its distinctive standards of fidelity and honor, higher at times than the standards of the market place. *Meinhard* v. *Salmon,* 249 N. Y. 458, 468, 164 N. E. 545, 62 A. L. R. 1. Whoever is a fiduciary or in conscience chargeable as a fiduciary is expected to live up to them."

The Court likewise ruled that there was no error in the ruling of the trial court whereby the highest value of the property up to the time of the decree was made the measure of the recovery, because the recovery would have been larger if the value at the sale, with legal interest thereafter, had been adopted as the measure.

Thus it is that by the exercise of our option to accept the bonds back we merely mitigated the damages recoverable to the extent of the value of the bonds, but in no manner have Plaintiffs ever waived the right to damages for the unlawful detention, measured by interest at the legal rate. In fact the demand for a release by the Defendant Trustees was for the purpose of avoiding damages.

The contention of Defendants that because of the price received Plaintiffs did not suffer damage is wholly untenable. If this position were correct, no damages for the unlawful detention of another's property could be recovered if the market price of the articles had advanced during the period of detention. Had we not availed ourselves of our right to take back the securities and sell them, we unquestionably would have been entitled to a verdict in the sum of $199,650.42, plus interest thereon from the date of the wrongful conversion until the date of the verdict.

The same identical rule, even more strictly applied, surrounds the liability of a trustee. As stated in *54 Amer. Jur., p. 196,* Sec. 253:

> "His liability for property that he wrongfully transfers to another or otherwise converts embraces liability for the property in its condition at the time of the conversion, or for its value in money at that time, and on his accounting he is chargeable with such liability with interest."

Again, Id., page 400, Section 502, it is said:

> "He must also account for interest on trust property or funds that he has wrongfully converted, * * *."

From the time of *McComb* v. *Frink,* 149 U. S. 629, 13 S. Ct. 993, 37 L. Ed. 876, there has never been any doubt that interest should be awarded against a trustee by way of damages for the wrongful conversion of trust property.

Nor is there any foundation for Defendants' contention that they had invited the Plaintiffs to sue, and therefore have prevented the recovery of proper damages. If this claim were correct, all a wrongdoer would have to do to prevent the accrual of damages for his wrongful conduct would be to suggest to the other party that he have recourse to the courts.

As to exemplary damages, not only have Defendants advanced no reasonable excuse for the unlawful detention of Plaintiffs' securities, but on the contrary the facts disclose that they acted arbitrarily and maliciously for the purpose of harassing the Plaintiffs and for the purpose of preventing the embarrassment that would ensue if the bonds were put back on the market and Plaintiffs obtain a higher price. It is admitted by Rorick himself in writing to his Co-Trustee (VII-1400) on July 2, 1941, that up to that time the Committee had been "successful in preventing any depositor from withdrawing from the Committee." Again he wrote to his Co-Trustee on July 10, 1941 (VII-1403), that he had advised withdrawing bondholders that the cost would be $35 per bond, which he and the other Trustee Easton, and the Secretary of the Committee thought

> "would prevent Mr. Kelley from proceeding further, but on July 3rd we received a telegram from him asking to whom to send the money, at which time we were greatly surprised."

Apparently also, the Chairman was actuated by a delusion that a Mr. Crummer was in some manner behind prior litigation instituted against the Committee—all of which Mr. Rorick admitted was based upon unsubstantial evidence —and he was apparently actuated by motives of revenge and withheld the securities for the purpose of burdening the Plaintiffs with expense of litigation.

Again he wrote to his Co-Trustee on October 14, 1943 (VII-1430), that these beneficiaries were not entitled to an accounting, nor to recover anything from the Committee, and that the Committee expected

> "to give it their best attention and to prove that withdrawing depositors are not entitled to an accounting, nor to recover anything from the Committee, other than their securities, which we have repeatedly offered to

deliver to them upon receiving proper form of receipt and release."

Rorick continued in his refusal even though he had been advised by the general counsel for the Committee on July 15, 1941, that Plaintiff Kelley had the right to withdraw his bonds (VII-1452).

Again Rorick writes his counsel Watson that he is not worried about the withdrawing bondholders whom he calls "dissenters," because the Committee now has the "money in the till" or "the ammunition ready to fight if we have to." Thus, he is going to use the trust funds to fight his beneficiaries and resist any action for an accounting.

Again Rorick advises how he has done everything possible to prevent these Plaintiffs from obtaining a higher price for their bonds, and that with the cooperation of the Governor, who was representing the debtor District, he hoped that no such higher price would be obtained because it was realized "that the payment to non-depositors of larger amounts than was paid to the Committee for their bonds would be a reflection upon the services and accomplishments of our Committee" (VII-1542).

This course of conduct did not cease even after the Court made its order requiring delivery, and only when served with a motion for a contempt citation were the bonds actually delivered—and then only upon Plaintiffs, in order to fulfill their contract of sale, entering into a bond conditioned upon the payment of any judgment that might be rendered on the Defendants' fictitious counterclaim.

Exemplary damages are allowed in Ohio where an agent, by false representations to his principal, obtains possession of his principal's goods and converts them to his own use. *Roberts* v. *Mason,* 10 Ohio St. 277; *Finney* v. *Smith,* 31 Ohio St. 534, 535; *Peckham Iron Co.* v. *Harper,* 41 Ohio St. 100.

The general rule is stated in 17 C. J., p. 979, as follows:

> "The question whether exemplary damages will be allowed in actions for injuries to property depends upon the nature of the injury complained of. They will be allowed only where such injury is attended by circumstances of wilful fraud, malice or gross negligence."
>
> "There may be a recovery of exemplary damages for a destruction of, an injury to, or a trespass upon personal property under any of the circumstances above enumerated, and it is not material to the application of the rule whether the action is for the value of the property, or for the recovery of the property itself. In actions for the recovery of personal property and damages for the tort, the fact that plaintiff has obtained possession of the property pending suit does not affect the question of exemplary damages."

Many authorities are cited in support of this well recognized rule, among which are *Arzaga* v. *Villalba*, 85 Cal. 191, 24 Pac. 656; *Ray* v. *Navarre*, 47 Okla. 438, 147 Pac. 1019.

It is submitted therefore that Plaintiffs were entitled to compensation and exemplary damages.

We make the following comments upon the erroneous statements of fact contained in the opinion of the Circuit Court of Appeals:

On page 1571 of the Record, the Court states that by July, 1931 holders of over $5,000,000 of bonds had deposited past due coupons or bonds and at the time of the sale ten years later holders of well over $8,000,000 in bonds had deposited their bonds and participated in the sale. The record is directly to the contrary. By the end of 1934 only $823,000 par value of bonds had been deposited; and when the $10 distribution belonging to the then depositors was held out to other holders, beginning in 1935, during that year $5,259,000 in bonds were deposited; in 1936, $864,000, and in 1937, $785,000; in 1939, there were $149,000, and in 1940,

only $64,000; and after the sale of June 6, 1941, 557 bonds were then deposited so as to receive the $20 per bond distribution and thus cut down the cost thereof to the owners, whoever they were (V-910). Thus it is, that even the holdings of the Committee members themselves had not been deposited until four years after the formation of the Committee. Furthermore, this conclusively proves that one-third of the approximate $9,000,000 in bonds outstanding could not possibly have requested the formation of the Committee.

On page 1572 of the Record, the Circuit Court of Appeals construed the Deposit Agreement as prohibiting any settlement for less than face value of the bonds without *ratification* by the bondholders. The Deposit Agreement contemplated no such thing, but specifically provided the necessity for prior authorization of the *proposed* sale or agreement should it be for less than the face value of the bonds and all accrued interest (I-86). The Committee, by the subterfuge of a purported amendment to the Deposit Agreement, circumvented the express terms thereof (VII-1308).

On page 1573 of the Record, the Circuit Court of Appeals states that out of the moneys received from the District under the (fraudulent and invalid) assignment it retained moneys for the payment of a dividend of $10 upon $7,109,000 of bonds which it *then* represented. Nothing could be further from the facts. At that time the Committee actually had on deposit less than $1,000,000 in bonds.

On page 1573 of the Record, the Committee is given credit for its aid in the "successful defense" of the Lawler litigation. This litigation was not successfully defended and resulted in payment in full to Lawler.

On page 1576 of the Record, the Circuit Court of Appeals states that "The Committee sought and received authorization of its bondholders to make a cash sale of the bonds

• • •." Nothing could be further from the facts. No authorization was obtained and the sale was without a semblance of authority. Any records concerning the thirteen preferred bondholders to whom the Committee Chairman had written were held inadmissible and the Committee was not required to produce the same.

The details and recapitulation of Exhibit 24, as stated on page 1577, are so completely out of line with the facts that further comment is hardly necessary inasmuch as the fraudulent nature of this exhibit, its hopeless inaccuracies and its many misrepresentations have been heretofore detailed.

The statement that H. C. Rorick had devoted the major portion of his time over a period of ten and one-half years, as stated by the Circuit Court of Appeals on page 1579, is hopelessly at variance with the record. He detailed his activities only until April of 1932, and from then on the only time spent was in the reports to bondholders in an effort to get more bonds on deposit in accordance with his promotional scheme and attending futile and useless conferences two or three times a year.

On page 1580, the Circuit Court of Appeals compliments the Depositary's records by saying "it is apparent that the records were in excellent shape at the time of the sale". How such statement can be made when no one connected with this litigation representing these beneficiaries, neither the Master, nor the Court below, ever saw those records is beyond comprehension. These were the very records Petitioners tried time and time again to have produced, all without avail.

The cases cited on page 1581 have been examined, and not one shows a deposit agreement with the kind of stringent provisions concerning appointment of successors and purported release from liability as does the agreement in this case.

The case of *Woods vs. City National Bank & Trust Co., supra,* cannot be distinguished on the ground that it was a bankruptcy proceeding inasmuch as the bankruptcy court was merely applying principles of equity, which we contend should be applied in this case. The duality and conflict of interests, which the Circuit Court of Appeals says was not present here, is the very duality and conflict which we attempted to prove by the records, access to which was consistently denied.

On pages 1581 and 1582, the Circuit Court of Appeals construes Article III, Section 3, of the Agreement as empowering the Committee in its uncontrolled discretion of fix the amount of the charge against bondholders. Such an agreement would be contrary to public policy; but the agreement in this case provided no such thing. The only discretion given the Committee was to fix the manner of pro-ration, and it clearly contemplated that the Committee should first fix and determine the actual expenses and liabilities and then in its discretion pro-rate them.

The statements on page 1582 that the Chairman of the Committee had "testified categorically that neither he nor the depositary had so traded (in the bonds)", and that "Easton so testified for himself, and further that *so far as he knew,* all bonds owned by the bank, partnership and individual members were deposited with the Committee and were assessed the $35.00", are typical of the manner in which these Petitioners were forced, time and time again, to take the word of these trustees without having access to the original records to prove the truth or falsity of their statements; and how these Petitioners were denied the right of full disclosure and the Trustees were allowed to account on the basis of "approximate" figures and their own recollections "so far as he knew"; and to then hold that the matter of abiding by the proper rules of evidence

and in enforcing full, complete, accurate and honest disclosure by trustees is a matter of discretion with the Master in supplementing or discrediting such testimony by the Trustees, is contrary to every known rule of procedure in cases of this kind.

On page 1583, the Circuit Court of Appeals absolves this Depositary from its duty to produce its records for the keeping of which it is charging beneficiaries of this trust upon the ground that they might reflect "the personal financial relationship between it and at least one thousand other bondholders". We submit that neither a trustee nor its depositary can have a personal financial relationship to the beneficiaries of a trust that cannot be revealed to the other beneficiaries. The cases cited in support of such an absurd proposition are matters of trade secrets and the rights of competitors—, not co-beneficiaries.

On page 1583, the Circuit Court of Appeals makes the amazing decision that the demand for the production of the records would have come with greater force if these Petitioners, or at least some of them, had testified or were present during the progress of the trial. Every fact sought to be developed was in the peculiar and exclusive knowledge of the Trustees; the burden was upon them; they had admitted that Petitioners owned the securities, and there was not one single fact to which Petitioners could have testified.

The statement on page 1583 that these Trustees had kindly offered to permit a certified public accountant to inspect the records under the supervision of the Master, and that Petitioners did not avail themselves of the tender, is simply contrary to the record. Petitioners demanded and tendered the costs for a complete and thorough audit by a certified public accountant, and this demand and tender was summarily denied. We categorically state that at no place in the record was there ever such offer made by these Trustees.

The statement by the Circuit Court of Appeals on page 1583 that the complaint of Petitioners that no books were kept simply amounts to a complaint that some one else might have kept the records differently, is contrary to the record; and there is absolutely no basis in the record for the finding of the Master that Exhibit 24 had constituted the complete and accurate accounting as required; and there is no evidence to sustain such finding.

The amazing holding that the question of conversion had not been presented to the Master or the Court, not only unduly confines the issues, but is contrary to the record (I-256, 259). It was the contention throughout in the District Court and in the Circuit Court of Appeals that the absolute and unconditional sale of Petitioners' property by their trustees had amounted to a conversion; and the refusal to return such property was an unlawful detention.

On page 1584, the Circuit Court of Appeals makes the amazing statement that these Trustees were ready to "settle with appellants but they, in demanding the identical bonds which they had deposited" thereby put the Committee to inordinate trouble in regaining them. It is unusual indeed that the trouble to which a trustee may be put in recapturing trust property which he has unlawfully converted in violation of the express terms of the trust agreement can absolve the trustee from damages for conversion. The significant thing however is that the bonds tendered would not have sufficed inasmuch as they did not correspond to the bonds deposited; and the partial assignment of the judgment carried with it accrued interest on past due interest coupons and interest after maturity, and was a more valuable asset than the naked bonds.

On page 1584, the Circuit Court of Appeals says that the Committee "could hardly settle with other bondholders until it had reached a settlement with appellants". This is

exactly what the Committee did, and purportedly has settled with other beneficiaries without such beneficiaries having any knowledge as to the facts concerning the administration of the trust.

The holding on page 1584 that the Committee was justified in demanding release from its beneficiaries without disclosing the facts concerning the administration of the trust, is contrary to every known rule of equity and every decided case; and the submission to the Court of the liability to withdrawing depositors was at the peril of these trustees. Otherwise all that would be necessary to absolve one from the payment of damages for unlawful conversion and detention would be to force the owner of the property to bring litigation for recovery and then set up that the question of return should be determined by the Court.

In the case at bar, the refusal was even more malicious because the counsel for the Committee had advised the Chairman that under the circumstances these Petitioners had an unqualified right to withdraw (VII-1452).

Conclusion

In conclusion, we apologize to the Court for the length of this supporting brief, but in view of the scope of the record it seemed to us advisable to detail the essential matters for the Court's convenience.

In summary, it is contended that Petitioners were denied their right to a full and complete accounting and disclosure by and discovery from their trustees; that the trustees should have been denied any compensation, and there should have been a drastic reduction in the exorbitant fees allowed the Depositary, Secretary-Treasurer, attorneys and employees; that there should have been a successor trustee appointed with orders to make a thorough audit and detailed accounting to be reported to the Court; and on the

basis of such report all beneficiaries should have had restored to them their rights in the trust; and Petitioners should have been awarded compensatory and exemplary damages for the wrongful conversion and detention of their property.

Respectfully submitted,

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